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ABSTRACT

Operation Iraqi Freedom (OIF) has put the issue of distinguishing between combatants and noncombatants front and center. The multiple insurgent groups that the US-led coalition forces faced following the initial conventional phases of the Iraq War that ended in Spring 2003 are a far cry from the traditional view of combatants, as the insurgents are non-uniformed and often carry arms secretly. Just War Theory is an important philosophical tradition, with one of its most crucial aims being to instruct commanders, officers, and soldiers on how to fight justly. I want to reexamine the principle of discrimination in light of OIF to determine if Iraqi insurgents can obtain a legitimate combatant status, and if they can or cannot, what this means for coalition soldiers. To do so, I will analyze three views regarding combatant status from Michael Walzer, Jeff McMahan, and Larry May, and I maintain that viewing combatants collectively is still the most practical way to determine combatant status. I then apply this view to the Iraqi insurgents and come to the conclusion that because soldiers want to fight justly, an opposing force must be cordoned off from the civilian populace in Iraq. To do so, then coalition forces need to continue to step up intelligence efforts to ensure their forces can meet this requirement. If coalition forces cannot accomplish this, then the counterinsurgency can no longer be fought because the principle of discrimination can no longer be upheld.

MAINTAINING DISCRIMINATION
IN OPERATION IRAQI FREEDOM

By

Kelly June McPherson
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THESIS

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The Principle of Discrimination

In Operation Iraqi Freedom (OIF), American and coalition soldiers have been presented with a daunting task of trying to identify an enemy combatant force, as the enemy in Iraq is the insurgent who hides within the civilian population of Iraq, and is often indistinguishable from the civilians. Iraqi insurgents do not wear uniforms, have resorted to treacherous and stealthy tactics to include suicide bombings, and have even taken the unlikely form of pregnant women, children, or handicapped people. Historically, soldiers have had issues shooting at distinctly identified enemy soldiers that wore uniforms and carried arms openly in past wars. Can you imagine, then, the uncertainty American and coalition soldiers are facing as they try to attack or retaliate against an indiscernible enemy?

“Belligerent armies are entitled to try and win their wars,” writes military theorist Michael Walzer in his *Just and Unjust Wars*, “but are not entitled to do anything that is or seems necessary to win. They are subject to a set of restrictions that rest in part on the agreement of states but also have an independent formula in moral principle.”¹ Just War Theory means just that—that a nation can sometimes have the moral justification to resort to war, and that soldiers have moral justification for the way that they conduct themselves within war. Just War Theory is often divided into two categories—*jus ad bellum*, or justification leading to war, and *jus in bello*, or justification

¹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York; Basic Books, 1997, 131.

in war. *Jus ad bellum* lays out principles in which a nation may be morally permitted to resort to war, and *jus in bello* lays out principles for how soldiers may fight once in war. Many theorists believe *jus ad bellum* principles and *jus in bello* are independent of each other, and that regardless if the reasons for a country going to war were unjust, then soldiers must still uphold *jus in bello* principles to fight justly. I will maintain this assumption that *jus ad bellum* and *jus in bello* principles are distinct through the remainder of this paper. *Jus in bello* principles, then, are specifically tailored to the commanders and soldiers fighting a war, and for soldiers who swear and live under codes of conduct, *jus in bello* principles become the rules of engagement in wartime. Just War Theory has been codified into international law, as evidence by inclusion of its principles in the Geneva Conventions and other UN charters.

The principle of discrimination, which is at the very core of *jus in bello* principles, stipulates that commanders and soldiers can only target those who are engaged in harm, and that commanders and soldier must discriminate between the civilian population and legitimate targets. The principle of discrimination is accompanied by several other principles in the *jus in bello* tradition, to include the principle regarding weapons prohibitions, which calls for adherence to international laws on weapons prohibitions. For instance, the use of chemical and biological weapons are forbidden by many international treaties. The principle of proportionality maintains soldiers must restrain force to an appropriate amount to achieve their targets or aims. For example, a fighting force should not unleash a nuclear weapon to clear out a small cave of Bin Laden supporters—that would be overkill, literally. Another *jus in bello* principle calls

for the benevolent quarantine for Prisoners of War (POWs), and international law has followed suit and codified certain guidelines regarding a respectful treatment of POWs. Another principle states that soldiers cannot use means, weapons, or methods that are inherently evil. For example, the use of mass rape or genocide against an enemy force or population enemy is strongly prohibited. And finally, the final principle in the *jus in bello* tradition requires that a fighting force cannot retaliate against a nation who violates *jus in bello* principles.

At the very heart of these principles is restraint, making war less brutal not only for the civilians, but for the soldiers involved in the fighting. The crucial point of Just War Theory *jus in bello* principles is that there are rules of war—and this distinguishes soldiers from common criminals.² Legally, soldiers must fight in accordance with these set rules to avoid prosecution by the international community. And when soldiers follow these rules of war, they are not being kind hearted, but are fighting justly.³

Along with trying to alleviate some of the atrocities that unfortunately accompany war, *jus in bello* principles require soldiers to conduct themselves justly in war in order to give an establishment of peace a fighting chance. War must be fought justly to avoid causing bitterness or provoking reprisals. If one side comes out victorious in war in using dirty tactics, then it is likely that resentment will fester on the part of the defeated force, and the achievement of a successful post-war peace will be threatened.

² Walzer, 128.

³ Walzer, 135.

For instance, currently in Iraq coalition forces are engaged not only in counterinsurgency operations, but also reconstruction operations to establish a successful Iraqi state. If coalition forces do not conduct themselves justly in waging the counterinsurgency, this could further alienate the Iraqi people, and then there could potentially be a threat to the establishment of a democratic Iraqi government.

In this paper, I will only be concerned with *jus in bello*, or justice in war, principles. These principles dictate how soldiers should rightly conduct themselves in battle, and the adherence to the principles falls primarily on the military commanders, officers, and soldiers who execute and formulate war policy of a nation state. *They* are the ones who can be held accountable for not adhering to the principles, a war crime on an international scale. In short, *jus in bello* principles need to be by their very nature practical, because the commanders and soldiers are the primary enforcers of these principles. *Jus in bello* principles do not just belong in the purely philosophical realm, because philosophers are not the ones who live or die by these principles. They need real world applicability.

Because I am focusing on the principle of discrimination in this paper, I want to take the time here to bring up some specifics in Just War Theory and international humanitarian law that pertain to discrimination. To begin, I want to examine a widely accepted doctrine by war theorists—the Doctrine of Double Effect. Traditional Just War Theory dictates that noncombatants cannot be directly targeted and must be spared in battle. Unfortunately, the avoidance of any civilian casualties in wartime is an

unrealistic expectation. Noncombatants are often endangered not because commanders and soldiers explicitly intended to attack them, but only because of their proximity to a battle that is being fought against combatant forces. For instance, on 5 October 2008, CNN reported that eleven civilian Iraqis were killed, including women and children, during a raid involving American troops. A US military spokesman stated that the American soldiers entered a building looking for an identified terrorist. The American troops were shot at and returned fire. The troops then reached the suspected terrorist who subsequently detonated his suicide vest, killing the Iraqi civilians that surrounded him. Of the eleven Iraqis killed, three were women and three were children. It is unknown how the eleven civilian Iraqis died, as they may have died from either the soldiers' shots or the detonation of the suicide bomb. This illustrates how civilians are easily caught in the cross fire of battle, especially when insurgents use civilians as human shields.

Although it is certainly unfortunate that civilians are often caught up in wartime activities, to stop a battle between thousands of soldiers because one civilian person may be a little too close to the battlefield seems practically silly. But what commanders and soldiers *can* do is recognize civilian rights as best as they can in the context of battle. "As best they can," though, can be a very nebulous measurement.

Walzer cites an interesting example of attempting to recognize the potential for civilian casualties, even in the heat of battle, from soldier Frank Richard's memoir about World War I:

“When bombing dug-outs or cellars, it was always wise to throw bombs into them first and have a look around them after. But we had to be very careful in this village as there were civilians in some of the cellars. We shouted down them to make sure. Another man and I shouted down one cellar twice and receiving no reply were just about to pull the pins out of our bombs when we heard a woman’s voice and a young lady came up the cellar steps. She and the members of her family...had not left [the cellar] for some days. They guessed an attack was being made and when we first shouted down had been too frightened to answer. If the young lady had not cried out when she did, we would have innocently murdered them all.”⁴

In shouting down the cellar at the family, Frank Richards and his fellow soldier accepted certain risks, namely, that there could have been Germans waiting to kill them in the cellars. In shouting down the cellar, Frank Richards may have alerted the Germans of their presence, thereby causing the Germans to attack them first. Military necessity probably would have permitted Frank Richards and his accompanying soldier in merely throwing their bombs into the cellar without warning as the cellars were notoriously inhabited by German soldiers, but yet Frank Richards still shouted.

The moral doctrine that is invoked in cases regarding potential civilian deaths in wartime is the Doctrine of Double Effect. With origins in Catholicism in the Middle Ages, the Doctrine of Double Effect is a complex notion that calls on soldiers and commanders to spare civilians, yet also accepts civilian deaths as part of the business of war. This seeming contradiction is surprisingly very palatable. When commanders and officers discuss military strategies, they discuss if operation will injure noncombatants, and to what degree, often using the term “collateral damage” to explain such potential loss of civilian lives. Soldiers tend to realize that in fighting an enemy force, inevitably some

⁴ Walzer, 152.

civilians will be caught in the cross fire. To have such expectations is the reality of war—unless soldiers fought in the middle of the desert or in the Antarctic, fighting will always be near to a civilian population. The Doctrine of Double Effect, then, is a “way of reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity.”⁵

Under the Doctrine of Double Effect, a wartime act likely to have evil consequences such as the deaths of civilians is permissible under four conditions:⁶

1. The act is good in itself or at least indifferent, which means, for our purposes, that it is a legitimate act of war.
2. The direct effect is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers.
3. The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect (killing of civilians) is not one of his ends, nor is it a means to his ends.
4. The good effect is sufficiently good to compensate for allowing the evil affect (killing of civilians); it must be justifiable, proportionately speaking.

⁵ Walzer, 153.

⁶ Walzer, 153.

It is apparent that these conditions that stipulate when civilian deaths are permissible in wartime may hinge on the third bullet point in this argument. Civilian deaths can be defended as long as one can articulate that his intentions were good when carrying out the attack. Some worry that the Doctrine of Double Effect may permit many more actions in wartime, as long as one is able to argue his way to the point that his intention in carrying out the attack was the good intention. This leaves a lot of room for personal interpretation. Some also worry that directly targeting civilians is not much different than knowingly killing civilians as a side effect of wartime activity. An often cited example of the potential overreaching (or even violation) of the Doctrine of Double Effect was the dropping of the nuclear bomb on both Hiroshima and Nagasaki, which at the time President Truman justified by saying that the bombings prevented far greater numbers of casualties that would have been inflicted by a Japanese attack on American forces or American soil. The dropping of the nuclear bombs on Japan is considered by many today to be morally reprehensible.

Another issue that arises in the examination of the Doctrine of Double Effect stems from the above complaint. Although the Doctrine of Double Effect reinforces the importance of taking proper aim in wartime, it still allows that a certain amount of civilian deaths are unavoidable. But one must worry that those unavoidable civilian deaths, which can be very large in number depending on the situation (and subject to the principle of proportionality, which has very vague guidelines), will be permitted under the blanket justification of Doctrine of Double Effect. Furthermore, if a

commander or soldier knows he is going to kill a certain amount of civilians anyways in battle, is he still blameless if a few more civilians than expected get caught up in battle?

Likewise, is directly killing civilians versus killing civilians as a side effect of war really that much different? It can be said that both ends are essentially the same—a group of dead civilians. And it can also be said it depends on the context of the commanders, officers, or soldiers as to whether there was the articulated good intention that cancels out the civilian deaths. Again, this would seem a lot of room for personal interpretation.

So simply not intending civilian deaths seems to be too loose of a rule. Walzer states that “Civilians have a right to something more,” such as a positive commitment on the part of soldiers and commanders to save civilians lives. But again, this is difficult to say exactly what a positive commitment means. Walzer writes,

“Exactly how far they must go in doing that is hard to say, and for that reason it may seem odd to claim that civilians have rights in such matters. What can this mean? Do civilians have a right not only to not be attacked but also not to be put at risk to such and such a degree, so that imposing a one-in-ten chance of death on them is justified, while imposing a three-in-ten chance is unjustified? In fact, the degree of risk that is permissible is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on.”⁷

Walzer correctly captures the cloudiness of how to determine what actively trying to avoid civilian deaths means, stating that judgments will vary determined by the context of battle.

⁷ Walzer, 156.

Daniel Zupan, in his *War, Morality, and Autonomy: An Investigation in Just War Theory*, responds to some of the critiques of the Doctrine of Double Effect. He believes that Doctrine of Double Effect can be an acceptable guide if viewed properly. Zupan explains that the doctrine would be an useful guide if the commanders and soldiers accepted some degree of risk in their positive commitment to minimize or avoid civilian deaths. Zupan states the worst decision an army can make is sacrificing civilian deaths to preserve its own combatant force, which is a relevant problem in an age where some armies seem to fight as to not lose the force.⁸ Rather, commanders and soldiers should recognize the potential harm their actions may cause to innocent civilians and accept costs to themselves to reduce the risk to these innocent civilians. This requirement of risk to the soldiers illustrates the positive care we want soldiers to take to spare civilian deaths. What the requirement of risk entails is also a bit fuzzy—the assessment of risk in a situation can be very different from one soldier to the next. Though the Doctrine of Double Effect is obviously a controversial part of the Just War Theory tradition, Zupan's addition of the requirement of risk seems to make it a bit easier to accept.

In addition to pointing out the Doctrine of Double Effect, I also want to call attention to the international humanitarian law that has been derived from Just War Theory principles. International humanitarian law has codified the principle of discrimination into statutes, and the nations that are signatories to the laws must ensure their fighting forces obey the statutes. In the aftermath of World War II which

⁸ Daniel S. Zupan, *War, Morality, and Autonomy: An Investigation in Just War Theory*. United Kingdom; Ashgate Publishing, Ltd, 2004.

saw high civilian casualties world wide, further (and much overdue) attention was given to officially defining the importance of discriminating between combatants and noncombatants. The Geneva Conventions of 1949, to which the United States is a signatory, required governments and armies to discriminate between combatants and noncombatants. Ratified by 194 countries, the Geneva Conventions of 1949 require that civilians, medical personnel, religious personnel, and *hors de combat*, or soldiers that are “out of the fight” by being wounded, sick, or detained, are to be considered noncombatants. Combatants were then defined by four conditions. A person was considered a combatant if:

1. He is commanded by a persona responsible for his subordinates.
2. He has a fixed distinctive sign recognizable at a distance.
3. He carries arms openly.
4. He conducts his operations in accordance with the laws and customs of war.

Criteria to aid this process were given and were again ratified by many countries in 1977 in the midst of the Vietnam War, when the Geneva Conventions in the Second Protocol explicitly stated, “The civilian population as such, as well as individual civilians, shall not be the object of attack...Indiscriminate attacks are prohibited.” The amendments to the Geneva Conventions in 1977 were highly controversial, particularly Protocol 1, Article 44 which further discusses combatant status:

“3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population

while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) During each military engagement, and

(b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.”

One of the most significant changes Protocol 1, Article 44 makes to international humanitarian law is that it responds to the context of the Vietnam War and throws out the requirement that combatant forces must have a distinct, fixed symbol, taking into account insurgent forces that often blend in with the civilian population. The amendment does, however, still require that these unmarked combatants to carry arms openly preceding an attack.

Though these paragraphs from Protocol 1, Article 44 were ratified by over 150 countries, the United States, Israel, Iran, Afghanistan, and Iraq have not ratified it. The

United States has hesitated to ratify the Protocol (though has signed it), due to the nature of insurgent and guerilla forces. It is important to note, though, that the reticence to ratify this amendment does not mean that United States does not respect the distinction between combatants and noncombatants.

The requirements of the Geneva Conventions regarding discrimination have also made an appearance in informal field doctrine. In the Gulf War, all US soldiers leaving for Kuwait were given a Pocket Card on the Rules of Engagement. At the bottom of the card was the following summary of the rules governing the conduct of US soldiers: "Remember: 1) Fight only combatants 2) Attack only military targets 3) Spare civilian personnel and objects 4) Restrict destruction to what your mission requires."⁹ Even late into the 20th century, we are treating the principle of discrimination in a rather traditional, straightforward manner, and its entire basis is contained on a business card for American soldiers.

Just War Theory obviously has a very historical nature, and it is also important to realize that military doctrine and international law for centuries has been dominated by and has responded to big battle philosophy and conventional warfare. For hundreds of years, we have viewed war in terms of organized or state actors, sweeping objectives, and decisive battles. While the focus of military doctrines within the last few hundred years was based on large scale conventional warfare, attention was also given to laying

⁹ As cited by Larry May in his article "Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants." *Ethics and International Affairs* 19 (2005), 40.

guidelines for the targeting of combatant forces, while noncombatant forces were afforded some sort of protection. The issue of discrimination was simpler in terms of conventional warfare, where state-sponsored uniformed forces met one another on a designated battlefield. However, the OIF is presenting soldiers with new challenges unanticipated by conventional warfare, and we must reexamine mainstream Just War Theory regarding discrimination as it stands to help us understand this shift in warfare.

OIF and How Warfare Has Changed Post 9/11

Because Just War Theory is a flexible doctrine that can respond to moral issues that arise in the context of battle, Just War Theory needs to be reexamined in light of challenges we are facing in warfare post 9/11 and in OIF. Few can deny that there has been a major shift in warfare from big battle philosophy and conventional wars to a more tactical, guerilla style of warfare. However, the US government and armed forces still conceive of wars in the traditional view and are conventionally trained. Further aiding the American tendency to view warfare traditionally is that the most recent reference point for modern warfare in the Middle East is the Gulf War.

The Gulf War and Iraq War are both wars that were fought and are being fought in a strange, misunderstood Islamic land.¹⁰ American forces in the Iraq War are uniformed and armed in similar fashions as they were in the Gulf War. The American public and especially the media conceive of both wars being latently associated with the

¹⁰ General Wesley K. Clark, *Waging Modern War*. New York; Public Affairs, 2002, xx.

United States' quest for oil and for bringing American democracy to the region. The Gulf War was initiated by a blatant conventional action by when it invaded Kuwait—a clear cut aggression that called for an obvious conventional remedy. However, the current Iraq War (aside from the first few months of a largely conventional campaign) is composed of the American and coalition forces piecemeal responses to various and widespread insurgent activities, obviously a sharp move away from big battle philosophy. In his *The Utility of Force: The Art of War in the Modern World*, British General Rupert Smith discusses the shift in warfare from big battle mentality to that of a conflict more resembling OIF. General Smith, a commander during the Gulf War, Bosnia, Kosovo, and Northern Ireland conflicts, highlights how our misunderstanding of modern warfare describes why we are not experiencing success in Iraq. He writes of this change in warfare,

“War no longer exists. Confrontation, conflict, and combat exist all around the world...and states still have armed forces which they use as a symbol of power. Nonetheless, war as cognitively known to most non-combatants, war as a battle in a field between men and machinery, as a massive deciding event in a dispute in international affairs: such war no longer exists...Nor, for that matter, is it ever likely to occur again, for the wars in which armored formations could and should be used are no longer practical.”¹¹

So why not take a deeper look at Just War Theory, which was developed in an age where these field battles between states and men and machinery were the ways of war? As General Smith succinctly noted, those days of conventional warfare are gone as

¹¹ General Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, New York; Vintage Books, 2005, 3.

we have seen in Iraq. If warfare has changed and American forces are being confronted with various new challenges across a new battlefield that are more prominent now, then why not revisit a somewhat antiquated Just War Theory in order to confront the important issue of discrimination between non-combatants and combatants?

If General Smith's brief monologue on how war has changed is not convincing, I want to further examine his ideas of how warfare has changed in recent years. He characterizes modern warfare by six trends, five of which I will present in this paper:¹²

1. The ends for which we are fighting are changing.
2. We fight amongst the people.
3. Our conflicts tend to be timeless.
4. New uses are found for old weapons,
5. Sides are mostly non-state.

1. The ends for which we are fighting are changing.

As General Smith accurately notes, industrial (or "big battle") war had clear-cut strategies. For example, in the Korean War, some of the American objectives included using air power to destroy North Korean transportation lines, targeting North Korean ammunition supply centers, and recapturing Seoul from the North Korean invaders. However, modern warfare has shown to be more complex, and often less strategic.

¹² General Smith, 271.

Instead of strategic and decisive battles, governments and militaries are instead seeking to “establish a condition” in modern conflicts, which are being fought for sub-strategic objectives.¹³ For instance, in the onset of the war in Iraq in March 2003, during the first few months Iraqi forces were targeted to achieve a strategic aim—the removal of Saddam Hussein and his sympathetic government and army. American and coalition forces accomplished this using fairly conventional means, such as airstrikes and some ground maneuvers—their efforts during this period were aptly titled “Shock and Awe.” However, once this strategic point was accomplished and American forces were met with a multi-pronged insurgency, objectives turned to establishing a democratic society in Iraq—more of a condition than a decisive, measurable strategic point. President George W. Bush has reflected the focus on establishing a condition in Iraq, as the goal of US policy in Iraq is establishing a state that can “govern itself, sustain itself, and defend itself.”¹⁴

As General Smith notes, our changing ends have produced “a forceful search for a condition.”¹⁵ He astutely recognizes that national armies still view their enemy and its people in war as someone who will eventually conform to their plan and share their idea of a future condition. Americans, despite many cultural and religious indicators that say

¹³ General Smith, 273.

¹⁴ James A. Baker, III and Lee H. Hamilton, co-chairs, and others. *The Iraq Study Group Report*. New York; Vintage Books, 2006, 40.

¹⁵ General Smith, 278.

otherwise, believe that Iraqis want freedom and will eventually take up the American cause of democracy in Iraq as well.

Furthermore, the objectives to establish a democratic society and stable government are being met with more of a tactical outlook, which has largely been driven by the nebulous enemy in Iraq. The underlying purpose of the insurgency in Iraq, says General Smith, is to “provoke a violent reaction, preferably an escalation of violence, which could be used to show the people of Iraq what ruthless invaders we [the coalition forces] are.”¹⁶ The insurgency is accomplishing this through provoking American and coalition soldiers with suicide bombers, roadside bombs, small scale attacks, and general widespread criminality. American forces, in turn, are goaded into responding in a similar fashion by responding to these attacks on a tactical level—small scale ground fighting, active human intelligence efforts to gain advanced warning on attacks, and security measures to defend against such attacks. American and coalition forces are not necessarily approaching the fight on a strategic level, but often on more of a day-by-day, tactical level.

2. We fight amongst the people.

This, perhaps, is the most crucial trend in the change in warfare regarding the principle of discrimination. Whereas soldiers strive to protect the civilians who stand

¹⁶ General Smith, 279.

behind them, the insurgents are protected by the civilians among whom they stand.

General Smith illustrates this point early in his book when he writes,

“It is the reality in which the people in the streets and houses and field—all the people, anywhere—are the battlefield. Military engagements can take place anywhere: in the presence of civilians, against civilians, in defense of civilians. Civilians are the targets, objectives to be won, as much as the opposing forces...Nation states, especially Western ones...all send in their armies, their conventionally formulated military forces, to do battle—to have a war—in these battlefields and they do not succeed.”¹⁷

The people in the cities, towns, streets, and houses in Iraq—all the people, everywhere in Iraq—are the battlefield. Military engagements can and do take place against insurgents moving amongst the Iraqi civilian population, and against insurgents disguised as civilians. Some insurgents have even disguised themselves as traditionally protective symbols such as Iraqi police officers or Iraqi army members to carry out deadly attacks. In discussing the dangers of insurgent warfare to Just War Theory as it stands, Walzer adds, “Wearing peasant clothes and hiding amongst the civilian population, they [the insurgents] challenge the most fundamental principles of the rules of war. For it is the purpose of those rules to specify for each individual a single identity: he must either be a soldier or civilian.”¹⁸ In using disguise, as I will later explore more specifically, the insurgents have masked their potential combatant status, confusing American forces and denying them the most elementary principle of warfare as summed up succinctly by Sun Tzu: “Know your enemy.” Traditionally, as I have

¹⁷ General Smith, 6.

¹⁸ Walzer, 179.

mentioned, to be eligible for war rights as soldiers, the insurgents must display a fixed and distinctive sign visible at a distance and must carry arms openly. Disguising themselves as civilians defies these requirements. The danger in this is that although American soldiers cannot readily identify the disguised or concealed insurgents, the insurgents know who *their* enemies are, and where their enemies are. The insurgents fight in small groups, with small arms, and in close quarters with their enemy—their *uniformed* enemy.

Weddings and peace meetings in Iraq are frequently infiltrated by insurgents and attacked. Busy marketplaces in and around Baghdad are often riddled with bombings. The insurgency fighter needs the people of the civilian population for the purpose of concealment to sustain himself. He develops an almost parasitic relationship with the civilian population as the insurgent uses them for transportation, utilities, revenue, and communication. Mao Tse Tung's famously said, "The people are to the guerilla as the sea is to the fish."

General Smith further highlights the nature of this relationship in discussing how insurgency fighters use space within a civilian population. Insurgents have a sanctuary area which is a place they can feel safe moving around in and communicating their views.¹⁹ For instance, during the initial phases of the Iraqi insurgency, Falluja became a "Taliban-like fiefdom" and base for Iraq's most violent insurgents, both for the local insurgents and foreign fighters. There is also a preparation area where the insurgents

¹⁹ General Smith, 284.

stash weapons, plan, and rehearse attacks. It is believed that Al-Qaeda's preparation area for the 9/11 attacks were in both Germany and Florida.²⁰ The insurgents then have an operational area which is where their target lies, and their actions in this area are driven by timing, disguise, and deception.²¹

In Iraq we see spectacular images in the media of uniformed, heavily armored soldiers patrolling Iraqi streets full of women and children in tanks. There is a dramatic distinction between American and coalition forces and the civilian population. However, the enemy in Iraq is composed of individual insurgents of all descriptions or alternative political leaders moving and fighting amongst the people, who are more often than not, virtually indistinguishable from the people. The challenge to American fighting forces, one can see, is formidable.

3. Our conflicts tend to be timeless.

General Smith makes this observation that has unfortunately become a hot issue for OIF. Politicians, the media, and the public are up in arms for a specific timeline in how the Iraq War is to be fought and ended. Even the presidential candidates attempted to tell the public that the United States will have troops completely out of Iraq by 2011. But the nature of modern warfare has proved such deadlines and requirements are hard to meet.

²⁰ General Smith, 284.

²¹ General Smith, 284.

Modern warfare, particularly using OIF as an example, is characterized by operations that go on and on...and on and on. Technically speaking, the United States has been involved in operations in and against Iraq since the Gulf War in 1990. As previously discussed, the United States has been trying to achieve the condition of a democratic state in Iraq, and such a goal has produced a less concrete timetable than a hard and fast one often created by strategic, conventional goals. To say that democracy will flourish in Iraq by let's pull out a random deadline...March 4, 2011...seems almost ridiculous. And by placing such a hard and fast deadline such as this can have the unfortunate affect of causing the insurgents to buy their time until democracy is in place and the United States is out of Iraq before resuming their treacherous activities.

One of the many factors that often make conflicts in modern warfare timeless is illustrated by how insurgents tend to fight. One of the fundamental tenets of the guerilla or insurgent is that he fights only when the time is right for him, and only at his convenience.²² In Iraq, American forces often do not engage in proactive, offensive battles led by coalition forces. Instead, American and coalition engage reactively, trying to respond to the attacks (whether failed, aborted, or successful) and determine who conducted the attacks. This makes it almost impossible to establish rigid, fast timelines, or even a solid measurement of victory in Iraq, as the battlefield, both in time and place, is being orchestrated by the insurgents. *We are on their schedule.* General Smith writes, the "guerilla picks small fights on his own terms. But these fights do not

²² General Smith, 292.

aggregate themselves into a battle...they establish an overall fight over time.”²³ The insurgents tend to fight adversary forces on a purely tactical level, so in turn, the adversary force fights back, or reacts, on a purely tactical level. This makes the insurgents extremely hard to beat quickly, as a nation such as the United States (with the Gulf War in its rearview mirror) is used to.

Another factor contributing to the timelessness of conflict in modern warfare is the difficulty capturing the will of the people. As previously mentioned, the insurgents embed themselves within the civilian population and even more frighteningly the insurgents *are* often the people. General Smith points out the challenges created by this when he says, “Rushing to achieve a quick victory against an opponent who refuses to cooperate in having to fight on your terms, particularly when operating amongst the people, is likely to alienate the people rather than to win them over.”²⁴ This inability, or inefficiency, in winning over the hearts and minds of the local population tends to lead to a protracted conflict. For example, Iraqi insurgents quickly realized the battle in Iraq was for the loyalties of the people, and began targeting the coalition-trained Iraqi security forces in order to show the Iraqi people that the security forces could not protect them.

²³ General Smith, 292.

²⁴ General Smith, 292.

4. New uses are found for old weapons.

Interestingly enough, a good portion of the equipment that American and coalition forces are using in Iraq was acquired to defeat the Soviets in a conventional, industrial war (though in the last few years the United States has complemented older equipment with newer technology to respond to this asymmetric warfare). This is because the United States, like many other nation states, still employs the logic of industrial war—the United States expects to have an identifiable threat in terms of the enemy and their weapons. The United States strives to match the enemy and his weapons with similar if not superior weaponry. The US government's and military's mindset is to meet threats or attacks with overwhelming force driven by a clear mission on how to use this force to get the job done. To do this, we have to gain a technological edge over the enemy.

However, the enemy that American forces are facing in OIF is of a completely different nature, as insurgents are armed with much simpler, lighter weapons. The insurgents have learned to drop below coalition weapons systems and technologies and to fight asymmetrically. For instance, Improvised Explosive Devices (IEDs) can be assembled from various common household items and are often remotely set off by the use of devices like garage door openers or cell phones. The suicide bomber is another example of a relatively simple weapon that has produced devastating results. In skirting under traditionally developed wartime technology, the insurgents are also trying to goad American forces into using "the big guns." They want to provoke American forces with their small scale attacks and primitive weapons so that coalition forces unleash

big, fancy weaponry to incite the people who American forces desperately trying to win their hearts and minds, which is crucial to separate the civilians from the insurgents.

Many of us have heard of the challenges American troops are facing in Iraq in dealing with antiquated and inadequate weapons. American troops have provided feedback to military and government leaders that they need more responsive weapons. They are requesting appropriate technology, to include armored vehicles and better body armor, to meet the challenges faced by this new kind of war. However, the government has been slow to meet their requests. Outfitting American and coalition troops with ineffective equipment just further illustrates the inability to let go of the old idea of warfare.

5. The sides are mostly non-state.

General Smith notes that nations tend to conduct wars and conflicts in “some form of multinational grouping,” whether it is an alliance or coalition, against other non-state parties.²⁵ This can be seen as an effect of the timelessness of the conflict—the more soft the objectives are (i.e. establishing a democracy in Iraq), the more protracted nations should anticipate the fight, and the greater need for states to join together for manpower and resources.²⁶

²⁵ General Smith, 303.

²⁶ General Smith, 303.

Such multinational groupings or coalitions are sometimes opposed by non-state actors as well. These non-state actors can be characterized as insurgents, guerillas, terrorist groups, or as being in the band of some warlord. In contrast to the organization and structure of coalition forces, the opposing non-state actors are formless, which presents obvious challenges. The insurgents or guerillas may sometimes borrow political or military titles that are familiar to state actors, and sometimes even speak of the so-called organization of their forces in a similar fashion, yet there is no real sincerity behind it.²⁷ This shift away from state versus state actors creates a situation where national soldiers fighting within an organization or coalition are fighting a formless, non-state opponent.

General Smith's characterization of how warfare has changed is a sound transition into discussion the particular players and problems American and coalition forces are facing in Iraq. Of OIF, the *Iraq Study Group Report* notes,

"Iraq is a centerpiece of American foreign policy, influencing how the United States is viewed in the region and around the world. Because of the gravity of Iraq's condition and the country's vital importance, the United States is facing one of its most difficult and significant international challenges in decades. Because the events in Iraq have been set in motion by American decisions and actions, the United States has both a national and moral interest in doing what it can to give Iraqis an opportunity to avert anarchy."²⁸

²⁷ General Smith, 305.

²⁸ Baker and Hamilton, 2.

With all of the commentary by political pundits, media coverage, and general discussion amongst the American public, there is widespread confusion of who American forces are fighting, how American forces are fighting, and what the United States is even trying to accomplish in Iraq. For the purposes of this paper and to understand why the issue of discrimination between combatants and noncombatants in modern warfare needs further examination, I want to present some of the basic issues of the Iraq War. The nature of the Iraqi insurgents and the attacks they carry out illustrate the struggles American and coalition forces have in distinguishing between combatants and noncombatants. Because Just War Theory responds to the context of war and because I want to reexamine discrimination in light of OIF, it is necessary to understand the context of OIF.

Following the initial phases of the Iraq War in the spring of 2003 where the coalition objective of ousting Saddam Hussein and his sympathetic government and army was accomplished by largely conventional means, coalition forces were met with a vicious, multi-pronged insurgency. The insurgency is said to have officially kicked off on 31 March 2003 when four American security contractors were killed by insurgents in Falluja, and subsequently their bodies were burned, hacked to pieces and strung up from a bridge over the Euphrates by a “delirious mob.”²⁹

Coalition forces, mainly comprised of American and British soldiers with small numbers of soldiers contributed from various allies, are not fighting against a single

²⁹ George Packer, *The Assassin's Gate: America in Iraq*. New York; Farrar, Straus, and Giroux, 2005, 297.

force—the notion of a sole, organized enemy force captured by traditional Just War Theory has left the building. The opposing insurgency in Iraq is comprised of many factions—some fighting each other and some fighting to remove the coalition forces from Iraq, and some fighting simply to fight.

The insurgency that followed the initial invasion into Iraq caught American forces by surprise. Lieutenant General William Wallace remarked, “The enemy we’re fighting against is a bit different from the one we war-gamed against.” American forces planned for the wrong enemy, ignoring Sun Tzu’s most famous adage. It was another “failure of imagination.”³⁰

It is believed that prior to the United States’ initial invasion into Iraq, Saddam Hussein and his government anticipated the conflict would morph into an insurgency. With this in mind, Saddam’s regime trained Iraqi officers and soldiers and even foreign fighters in guerilla tactics, explosives, and marksmanship at a training camp southeast of Baghdad. Iraqi commanders stashed weapons and equipment in farms and houses all over the countryside. American intelligence officials later learned Saddam and his generals were studying Vietnamese manuals on guerilla tactics. Saddam recognized the struggles the United States had faced in Vietnam, and realized that if he fought the United States conventionally, superior American conventional forces would obviously demolish the Iraqi conventional forces. If Saddam met American forces with an insurgency though, the Iraqis would be a more destructive force.

³⁰ Packer, 298.

However, American war planners did not want to consider fighting an insurgency an option, especially with the Vietnam War in the rearview mirror. T.X. Hammes, a Marine colonel, remarked that after Vietnam, “There was a pretty visceral reaction that we would not do this [fight an insurgency] again. We stopped thinking about insurgency years ago. So even when we figured out Iraq was an insurgency, we didn’t know what to do about it.”³¹ In the outset of the war, guerilla warfare in Iraq was simply not an option, and in turn, the United States planned for the wrong adversary. Because government and military officials had not planned for an insurgency, the initial calculations American politicians had made about the Iraq War were no longer useful.³²

The Iraqi insurgents, then, had time to prepare. Most of Saddam’s regime formed an early insurgent group that fell under the Ba’athist party, but its members later dispersed into other insurgent groups after they realized their goal of reinstating Saddam’s regime was wildly unrealistic. Early preparation has been an advantage for the insurgents, and they adapted quickly as the battlefield shifted from that of a conventional war to that of an insurgency.

Some insurgent groups, in particular Al Qaeda, underwent intense training to battle the United States in guerilla warfare. They had hands-on training with a wide variety of both Soviet and US made weapons and explosive devices. They trained in detailed classroom lectures on use of these weapons and explosives. The insurgents

³¹ Packer, 301.

³² Packer, 301.

underwent physical training that resembled the rigorous training that American Special Forces teams conduct. Their physical training was complemented with lessons in surveillance, infiltrating personnel and weapons through security checkpoints, small-unit tactics, assassination, kidnapping, and urban warfare.³³

In the early weeks of the insurgency, insurgent attacks against coalition forces were straight-on assaults conducted through small arms fire and rocket propelled grenades (RPGs). Many insurgents died in these initial attacks, but the smarter fighters that survived learned their lessons and made appropriate adjustments to their tactics. The use of IEDs and other forms of deadly ambush were instead employed by insurgents, which saw success in killing American and coalition soldiers by the handful.

The Iraqi insurgency has been described as a fragmented network which has in some respects rendered it inefficient but has also made it difficult to defeat because there is no command structure. Therefore, it could survive substantial damage, as conventional tactics typically target a set leadership structure. Insurgents have intimidated the civilian population in Iraq through violent attacks and threats of death, while also luring coalition forces to violently overreact to swing public support to the insurgency. As a whole, the Iraqi insurgency also lacks a unifying ideology, though many groups want to push the American forces out of Iraq. However, what the insurgents have lacked in structure and vision they have more than made up for it in weapons, money, and trained personnel.

³³ Omar Nasiri, *Inside the Jihad: My Life with Al Qaeda*. New York; Basic Books, 2006, 139-168.

There are many players within the Iraqi insurgency, with some even estimating that up to 40 distinct insurgent groups are operating in Iraq.³⁴ In the interest of time and space, I will only discuss some of the main factions, the first of which are the Ba'athists. Following the overthrow of Saddam Hussein in 2003, the Ba'athist group sought to restore Hussein's regime in Iraq. The Ba'athists were supporters of Hussein's former regime, and were comprised of former army and intelligence officers. It is thought that some of these intelligence operatives established a plan for guerilla warfare after the fall of Hussein. When it became clear with the capture of Saddam that the odds of reinstating him as dictator were highly unlikely, the members of this movement spread to other insurgent groups. They brought with them their planning and tactical ideas for guerilla warfare.

Another prominent group in the insurgency is the Sunni Arab insurgents. Though Iraq has a largely Shiite population, Saddam Hussein's government was almost solely Sunni Arab in name (although it is probably more realistic to assume that his government held no religious beliefs). After Saddam Hussein was ousted from power by coalition forces in 2003, the Sunni Arabs obviously lost some of their political clout in Iraq. The Sunni Arab insurgency, then, is looking not only to oust the US-led coalition forces from Iraq but also to restore Sunni rule, though they have not properly articulated their vision to the public. Sunni Arabs seek to restore pure Islam in Iraq and are opposed to foreign, non-Muslim influence. The Sunni Arab insurgents have not only

³⁴ Baker and Hamilton, 3-32.

targeted coalition forces, but are also in constant conflict with Shiite militias and death squads. There is no identified leader in the Sunni Arab insurgency, and it has been called “a network of networks.” This lack of organization and almost cell-like structure of the Sunni insurgency has posed a great challenge to coalition forces.

Another player in the insurgency is the Shiite militias and death squads. Like the Sunni Arab insurgency, the Shiite militias are focused not only on removing coalition forces in Iraq, but also on gaining Shiite power through clashes with the Sunni Arab insurgency. Some of the militias and death squads are affiliated with the fledgling Iraq government and some are locally grown and operated. The militias despicably target Sunni Arab civilians while some target government ministries. The prevalence of the Shiite Arab militias with government ties sends a powerful message within Iraq, a message that says political leaders can preserve their power if backed by force, and can also lose it just as easily if the force turns against them.

Yet another group, perhaps most famously, is part of the insurgency—Al Qaeda and its affiliated jihadist groups. Al Qaeda actually contributes a relatively small portion of the overall violence in Iraq, but produces some of the more spectacular and influential attacks to include suicide bombings, truck bombs, and assassinations of political leaders. Al Qaeda is now mainly based and operated within Iraq, as it has taken advantage of an unstable state. With the obvious goal of removing the US-led coalition in Iraq, Al Qaeda is also concerned with instigating violence between Sunni and Shiite factions. Some speculate that Al Qaeda is trying to keep Iraq unstable by fueling clashes between

insurgent groups, so that Al Qaeda can continue to use Iraq as a base for terrorist operations.

And to think, there is even another part of the insurgency, which has proved to be the most volatile and difficult to pin down—the widespread, organized crime in Iraq. Criminals have capitalized upon the instability in Iraq and have made life unbearable in Iraq, as robberies, kidnappings, and murder are sadly commonplace throughout the country and even more concentrated in Baghdad. Crime rackets thrive on and even cooperate with insurgent groups. Sometimes pockets of criminals claim to be part of the causes of other insurgency factions to gain legitimacy for their actions.

To add to this already dire picture, Syria and Iran have extremely porous borders with Iraq. The loose borders of Syria and Iran have provided insurgent groups safe havens to regroup and plan operations against coalition forces or other opposing insurgent groups. Some in the intelligence community believe that Syria and Iran have contributed weaponry and manpower to various insurgent groups. The ability to contain the insurgency within Iraq remains a challenge for coalition forces. In short, coalition forces are getting slammed from all sides. Gone are the days of state actors facing off on a set battlefield of which our mainstream Just War Theory is set up around.

While the initial invasion into Iraq called for a conventional response by coalition armed forces in the spring of 2003, the United States and its allies have continued to structure their forces as if fighting a conventional war. As of 2006, approximately 141,000 US military personnel were serving in Iraq, together with about 16,500 military personnel from 27 coalition partners, with the largest contingent being from the United

Kingdom at 7,200. Along with this, the United States has about 1,000 embassy personnel and Baghdad and approximately 5,000 civilian contractors in country.³⁵

With the onset of the insurgency following the early conventional fighting in 2003, coalition forces have rarely engaged in large-scale military operations for which they are better prepared. However, military training for a large part of American forces has been, and still is, primarily directed at training its members for conflict between nation states. Military members are schooled in classical war doctrines, such as Clausewitz. American military forces are uniformed, structured, and organized in a top-down leadership model, as opposed to the insurgents who blend in with the civilian population, lack structure, and are organized horizontally or in cell-like groups. American forces are divided into battalions and squadrons. American forces are taught maneuvers from both World Wars and Koreas. American forces study air campaigns from Vietnam and the Gulf War. American forces are better prepared for conventional battles that they are not experiencing in Iraq.

Instead of fighting conventional and strategic battles, coalition forces have been engaged in piecemeal counterinsurgency operations, and have focused on the strategy of “clear, hold, and build”—“clearing” areas of insurgents and death squads, “holding” those areas with coalition forces and Iraqi security forces, and “building” areas with quick-impact reconstruction projects.³⁶ This strategy has seen both success and failure.

³⁵ Baker and Hamilton, 7.

³⁶ Baker and Hamilton, 7.

Since the end of the conventional phase of the Iraq War in spring of 2003, coalition forces have mainly engaged in small-scale, reactive operations. Coalition forces have been fighting the insurgents on the insurgents' terms—the insurgents often dictate the time and location.

American objectives in Iraq are less clear cut than previous objectives in past wars, thus a testament to how warfare is changing. The United States is seeking to secure and strengthen the new Iraqi government, rebuild the economy and infrastructure in Iraq, and maintain the stability of the region. One of the grassroots strategies in accomplishing this lofty goal is to train competent Iraqi security forces to help bring about stability within Iraq. Coalition forces have actively engaged in training Iraqi Army forces and Iraqi police forces. At the end of 2006, it was estimated that over 300,000 Iraqi security forces were trained and equipped by US-led coalition forces.³⁷ However, the states of both the Iraqi Army and Iraqi police are unsatisfactory. The Iraqi Army suffers from a lack of leadership, personnel, equipment, and support. The Iraqi police are even worse off, as they cannot even begin to control the high rates of crime in Iraq, and often engage in or are bribed into sectarian violence themselves.

I could go on for hundreds of pages on the challenges the United States faces in accomplishing its goals in Iraq, but I merely wanted to highlight the nature of the fight in Iraq—American and coalition are no longer fighting an organized state actor, but are being bombarded with small battles led by multiple insurgent groups, battles that

³⁷ Baker and Hamilton, 7.

American conventionally structured and trained forces were somewhat unprepared for. I want to now look at specific examples of how the insurgents are fighting American forces to further understand how warfare has changed and what we must accomplish in the discussion of distinction between combatants and noncombatants to clarify the principle to soldiers. All examples have been taken from mainstream media sources, such as CNN or Fox News.

In March 2007, a suicide bomber wounded the Iraq Deputy Prime Minister while killing nine other people. The suicide bomber was disguised and posing as one of the Deputy Prime Minister's bodyguards. Many insurgents are infiltrating the fledgling government's ranks, and American and coalition forces continue to struggle to identify who is a friend and who is an enemy. Also in March 2007, Iraqi policeman with believed Shiite militia connections were being blamed for a wave of shooting deaths in Tal Afar. Again, the insurgents are either posing as or controlling a sizeable portion of the security forces that American and coalition forces are training. Here, too, American forces are having a hard time identifying the legitimate Iraqi security personnel from the insurgency-fed personnel.

Insurgents are also posing as newly trained Iraqi military members. In using the small amount of trust American forces and Iraqi civilians place in the military members, they are using the position to their advantage to carry out attacks. In July 2007, insurgents wearing Iraqi military uniforms killed 29 people in an attack near Baquba, and wounded four others. A military spokesman confirmed the gunmen were wearing

military uniforms and intended to make villagers believe they were soldiers and said, “Eyewitnesses said that the villagers were surprised when they saw a large number of these terrorists surrounding the village from every entrance, aiming their weapons at the chests of children, men, and women.”

Perhaps more alarmingly, insurgents have also taken to defying the tradition notion of a combatant by employing women to carry out deadly attacks. In July 2007, a car dropped off a traditionally dressed Muslim woman, clothed in a black gown and headpiece known as an *abaya* with her face veiled close to the walls of a security checkpoint near Baghdad. As she drew closer to the checkpoint, the woman seemed to trip and fall, calling out to the nearest policeman for help. As two Iraqi policeman approached, “the woman reached into her tunic and pulled the trigger on her bomb belt...” Soldiers, as I mentioned early in this paper, already have an innate distaste for killing other individual soldiers in wartime. Can you imagine the difficulty a soldier would have in assessing a traditionally dressed Muslim women who appeared to be seeking help as a threat? Can you imagine the further difficulty of having to pull the trigger and shoot at the woman?

Also in July 2007, coalition forces stopped a 13 year old boy carrying a homemade bomb on his bike. Another unsettling trend regarding insurgent tactics is the use of children in operations and attacks. In November 2007, a report assembled by British intelligence services cites that terrorists and insurgents in Iraq are “methodically and intentionally targeting young people and children...they are radicalizing,

indoctrinating, and grooming young, vulnerable people to carrying out acts of terrorism.” In August 2007, a major US newspaper further discussed the use of young people by insurgents groups in Iraq. Children are playing a significant and growing role in kidnappings, killings, and roadside bombings. Boys as young as eleven make up a sizable amount of inmates in detention camps across Iraq, and are now outnumbering foreign fighters in these facilities. According to Major Douglas Stone, a commander of detainee operations, Al Qaeda and other insurgent groups are recruiting children because they are easily influenced and do not draw as much scrutiny from coalition forces. Children are primarily being used by Iraqi insurgents to plant roadside bombs or as accessories in kidnappings and killings. What does this do to opposing forces who observe the guidelines for defining combatant status per international humanitarian law? Perhaps I should not keep reiterating the fact that soldiers often hesitate in wartime to kill other soldiers, but show me the soldier who feels comfortable and justified in killing a young child, regardless of the indicators of a threat.

In February 2008, a Federal Bureau of Investigations (FBI) and Department of Homeland Security (DHS) assessment further confirmed that terrorist and insurgents are increasingly favoring using women as suicide bombers to thwart security. Iraqi women are hiding explosives in prosthetic devices on their torsos to mimic the look of pregnancy. Not only have the insurgents used women in attacks and operations to rout American forces, but they have disguised these women to appear to be in their most vulnerable state. In American society as in many other societies around the world,

pregnant women are often treated delicately. Aiming an M-4 at a pregnant woman is obviously a revolting thought, and one can see why soldiers have not been able to stop female suicide bombers.

In February 2008, two women, who appeared to have Down's syndrome, attacked a market near Baghdad with a bomb. It almost seems as though the insurgents have upped the ante—first, in using women and children, then in employing a disguised pregnant woman, and now in using a mentally handicapped team of women to attack a local market. In April 2008, female suicide and car bombers attacked Iraqi security forces checkpoint in Baghdad, killing three and wounding four.

In May 2008, a man in a wheelchair blew himself up in a northern Iraq police station, killing three and wounding nine others. The explosives were placed under the seat. Military officials expressed concern over the insurgency tactics. Like pregnant women, handicapped people are often given special treatment in the United States as in many other countries, and this ruse was incredibly effective. Bombs have also reportedly been placed not only under wheelchairs, but in dead animal carcasses and hidden in carts. Vagrants have been involved in bombings as well.

In June 2008, it was reconfirmed that female suicide bombers are taking a deadly toll in Iraq, according to US military officials. As of June 2008, women have been responsible for 20 bombings in 2008, as opposed to 8 total bombings in 2007. A recent attack in Baquba by female suicide bombers killed 16 and wounded 40. In mid-May 2008, a woman approached an Iraqi police officer, requesting help. She then detonated

a vest that killed the police officer and others. A military official has remarked, “In every instance, female suicide bombers have been able to get through intended targets despite multiple layers of security.”

In June 2008, Capt Philip Dykeman, a Marine officer from Syracuse, NY, was one of three soldiers killed by a suicide bomber who was disguised in an Iraqi police uniform, another instance of Iraqi insurgents abusing a uniform that has a sense of trust behind it. Also in June 2008, two men and four women detonate a car bomb in a market in Baghdad, killing 63 people. Again reaffirming the increased use of children within the insurgency, in this month, six teenage boys, ages 14 to 16, were detained and claimed they were being trained as suicide bombers.

These are just a few instances of events in Iraq that were widely reported by the media, and a glance into military intelligence reports would further illustrate the severity of the problem. The adherence of American forces to the traditional view of combatants is accompanied by high casualties—the 4000 plus US troops that have died thus far fighting the insurgents in Iraq far exceeds the numbers of troops the United States has lost in combat since Vietnam. American soldiers, who have been taught about the enemy in terms of conventional warfare, are having difficulty conceiving of how to think of this new enemy in Iraq. Though the soldiers on the front lines in Iraq are the eyewitnesses of this shift in the nature of the enemy, unfortunately most of them have been trained in the traditional conception of what identifies a combatant, which may account for the large number of returning troops suffering from Post-

Traumatic Stress Disorder and may even explain the alarming rise in suicides amongst US Army troops. American soldiers are taught that a combatant is typically male, uniformed, and openly carrying weapons, as defined by traditional Just War Theory and international humanitarian law. Along with this, American soldiers also believe that women and children are typically considered noncombatants, along with medical and religious personnel, and wounded soldiers.

The insurgents are preying on this traditional training and mentality of the American forces and are defeating them in small skirmishes. When asked if he could distinguish between “good” Iraqis and “bad” Iraqis, US Army soldier John Prior answered, “How can you tell them apart? The same guy that waves at you can shoot you with an RPG.”³⁸ He further notes in a journal after spending five days in Ramadi and then Falluja:

“The entire situation seemed very weird. It is clear now that they [the Iraqis] are not as happy as they say that we are here. For the first time in awhile, I felt extremely nervous being in such close proximity to Iraqi nationals. I do not trust them...The Iraqis are an interesting people. None of them have weapons, none of them know where the weapons are, all the bad people have left Falluja, and they only want life to be normal again. Unfortunately, our compound [in Falluja] was hit by RPG fire today so I am not inclined to believe them.”³⁹

The insurgents have capitalized on the failure to adapt to this idea of an enemy, and have used the United States’ acceptance of Just War Theory principles against US forces. The insurgents terrorize the Iraqi civilian population and kill coalition forces in using

³⁸ Packer, 222.

³⁹ Packer, 222.

non-traditional methods, such as the use of women, children, and even handicapped people in attacks or operations. The insurgents do this because they know that an American soldier will hesitate to shoot a woman, hesitate to take down a child, and will most certainly hesitate to point a weapon at a handicapped individual.

So what should be done then? Should we just abandon the principle of discrimination altogether? It seems as though discrimination may be a moot point in Iraq. If the insurgents are recruiting and employing women and children for attacks, are using respected uniforms as disguises, and are even sending out handicapped people strapped with bombs, with the expectation that American forces will refuse to take aim, then why even bother to hold onto the principle of discrimination? One of the main features of an insurgent fighter is the focus on moving stealthily within the civilian population, and in OIF the insurgents are successfully accomplishing this tactic. The insurgents are terrorizing Iraqi civilians and coalition forces with their attacks that skirt security by employing women, children, and disguised men with hidden weapons such as suicide bombs. Coalition forces often do not know who to target their attacks against, which is a major problem for the principle of discrimination. Does the steadfast commitment to distinguishing between combatants and noncombatants then need to be retired?

My answer, like many others, is a resounding no. The ultimate purpose of Just War Theory is to lessen the brutality of war. The most visible and humane way to mitigate the impact of war is to keep war within certain boundaries, accomplished by

soldiers only targeting those that are engaged in the business of war. The principle of discrimination guides soldiers to refrain from intentionally attacking civilians by forcing the soldiers to stop and think before they shoot. Studies have shown that this in turn causes a less chance of violence—and isn't that what we all want?

Practical reasons, as illustrated by some of the atrocities American forces are facing in the Iraq War, may lead some to believe that discrimination is a non-issue. If the insurgents are disguising themselves as noncombatants, then why even stick to the rules? If we throw out discrimination as a *jus in bello* principle, then why bother to salvage the rest of the *jus in bello* principles? If we do not designate who soldiers can legitimately fight, then why designate boundaries regarding weapons or prisoner treatments if everyone is up for grabs? If nations and their soldiers can wage war against whomever they please and wherever they please, why should there be rules about their conduct? The principle of discrimination gives war a playing field with opposing teams. And these teams then are subject to the rules of the game.

Just War Theory through the principle of discrimination helped create a battlefield and opposing sides. The nature of the battlefield has shifted in the Iraq War, as has the nature of the opponent. But instead of focusing on those on the sidelines watching the game (the noncombatants), I want to now turn the attention to the players on the field—the combatants. Though Just War Theory is rightly concerned with protecting the lives and rights of men, women, and children that are considered noncombatants, at the heart of Just War Theory also lies a certain view of combatants,

which stipulates their battlefield equality. I want to now analyze some different views regarding combatant status, and determine which view is the best to apply to insurgents groups in OIF. I will examine Michael Walzer's collective view of combatant status, Jeff McMahan's view of combatant status stemming from a contextual liability, and Larry May's view which assigns combatant status on a threats-based individual level.

Walzer's View

Perhaps the most ardent modern supporter of viewing combatants collectively is Michael Walzer. Walzer's view, though, has historical philosophical roots in a theory put forth by Jean Jacques Rousseau. As the power of states increased following the Treaty of Westphalia in the seventeenth century, the focus of war theory shifted from how individual soldiers interacted with other individual soldiers on the battlefield to how large scale acts of states and rulers influence war. War became a condition between states, and soldiers were merely the technology for resolving the dispute. Rousseau was an early proponent of viewing combatants collectively, and I want to briefly give attention to his thoughts before moving on to discuss Walzer.

In his *Social Contract*, Rousseau advocated popular sovereignty explaining that social order is a sacred right which is the basis for all other rights.⁴⁰ Rousseau believed that the people sanction the Sovereign, who in turn should represent the general will. Rousseau described this concept like this: "Each of us places his person and authority

⁴⁰ Jean Jacques Rousseau, *The Social Contract*. Translated by G.D.H. Cole. New York, Barnes and Noble Books, 2005, 2.

under the supreme direction of the general will, and the group receives each individual as a indivisible part of the whole.”⁴¹ In sanctioning a Sovereign, the people are relinquishing some rights in order to be a part of the society that the Sovereign protects. Because of this Rousseau writes, “Their very life, which they have devoted to the State, is by it constantly protected; and when they risk it at the State’s defense, what more are they doing than giving back what they have received from it?...All have indeed to fight when their country needs them; but then no one ever has to fight for himself.”⁴² Furthermore, if the prince (or Sovereign) requests that it is “expedient for the State” that one should die, one ought to die, because his life thus far in security was a conditional gift from the State.⁴³ In representing the general will of the populace, the sovereign must draw no distinctions—the sovereign must make decisions not based only on the individual, but on the people. Rousseau conceived of political authority as existing in relationships among individuals. When the individuals are linked together politically this affects the norms of what they do individually as part of these politics. One might assume then, with the focus on the individual role in the political process, that Rousseau would reject the notion of a collective combatant status.

But this is not the case. Rousseau writes that “War is not then a relationship between one man and another, but a relationship between one State and another, in

⁴¹ Rousseau, 35.

⁴² Rousseau, 35.

⁴³ Rousseau, 36.

which individuals are enemies only by accident not as men, or even citizens, but as soldiers; not as members of the fatherland, but as its defenders.”⁴⁴ Of war, Rousseau also stated that war is constituted “by a relation between things, and not between persons; as the state of war cannot arise out of simple personal relations, but only out of real relations...”⁴⁵ Things such as individual combats, duels, and encounters do not constitute states of wars.

Rousseau’s main theme is that the Sovereign represents the general will, and that each of us places our person and authority under the direction of the Sovereign, and the “group received each individual as an indivisible part of the whole.”⁴⁶ Soldiers are a particular group within this group of people, with their persons and authority being placed under the Sovereign who is (hopefully) using them for the protection of the general will. Rousseau is quite explicit that the soldiers are fighting on behalf of the State at the direction of the Sovereign. Rousseau’s view seems to be a precursor of identifying a collective combatant class, a class of soldiers that is subservient to the State.

Perhaps with Rousseau’s arguments in mind, Walzer also views combatants collectively. In *Just and Unjust Wars*, Walzer says that soldiers lose the individual rights they are defending in wartime, regardless of their choice to fight or not. While losing

⁴⁴ Rousseau, 10.

⁴⁵ Rousseau, 10.

⁴⁶ Rousseau, 14.

their individual rights as citizens, soldiers instead gain war rights as combatants, and possibly prisoners of war, and may be permissibly attacked or imprisoned by the enemy forces. On the flip side, combatant status also gives soldiers permission to attack or imprison the opposing enemy force. “Simply by fighting,” Walzer writes, “whatever their private hopes and intentions, they have lost their title to life and liberty, and they have lost it even though, unlike aggressor states, they have committed no crime.”⁴⁷ Walzer cites a famous quotation by Napoleon that runs, “Soldiers are made to be killed; that is why war is hell.”⁴⁸ The point to note here is that we are not just talking about that soldiers are made to be killed, but that *no one else* is made to be killed, thus drawing a distinction between combatants and noncombatants which is the basis for the principle of discrimination in Just War Theory.

Just War Theory cordons off people who may not be attacked per international law, thereby loosely classifying them as noncombatants. All people not considered noncombatants are appropriately considered combatants. What does this mean? Walzer responds to the question of what it means to be a combatant and the issues that can arise from it with his famous example of the naked soldier, which he takes from Robert Graves, that goes like this:

“While sniping from a knoll in the support line, where we had a concealed loop-hole, I saw a German, about seven hundred yards away, through my telescopic sights. He was taking a bath in the German third line. I disliked the idea of shooting a naked

⁴⁷ Walzer, 136.

⁴⁸ Walzer, 136.

man, so I handed the rifle to the sergeant with me. 'Here, take this. You're a better shot than I am.' He got him; but I had not stayed to watch."⁴⁹

Although Graves refused to shoot the enemy soldier, Walzer points out that this was not a moral judgment, but was more a feeling of dislike. Robert Graves did not morally object to shooting the naked soldier, he did not believe it was wrong to do so, but he disliked the idea of doing so. For Walzer, there is a fundamental recognition that it is, in fact, permissible to kill the naked soldier, because even though the soldier does not seem to be acting "soldier-ly" at that particular moment, he is still part of the class of soldiers and may resume his role as a dangerous man at any time. Walzer writes that soldiers "do not always fight; nor is war their personal enterprise, but it is the enterprise of their class, and this fact radically distinguished the individual soldier from the civilian he leaves behind."⁵⁰ The naked soldier is still a soldier who may be attacked at any time, as opposed to noncombatants who soldiers should refrain from attacking. For Walzer, every soldier has lost his immunity (even when in the bathtub) from being killed by enemy forces when he was made into a soldier.

Walzer believes that the example of the naked soldier should be resolved by setting soldiers aside as a class of people. Soldiers are set apart from the world of civilians, of peaceful activity. Soldiers have been trained to fight, carry weapons, and can be required to fight by the command of a superior or the state. This does not

⁴⁹ Walzer

⁵⁰ Walzer, 144.

always mean that they do fight, but “it is their enterprise.”⁵¹ Soldiers are forewarned upon their conscription or swearing in as soldiers that he or she may always be in danger.

Whether the soldier has chosen to join the army or is conscripted is of no issue here to Walzer. In both senses, the soldier has not been forced to fight by a direct attack upon himself—that would be a crime of aggression at the individual level. American troops are not fighting in Iraq because of personal attacks, but because they were sent to fight for a bigger issue. One may try to argue that because a soldier lost a loved one in the 9/11 terrorist attacks on the World Trade Center, this could qualify as a personal attack that would lead him or her to enlist and fight in the War on Terror. However, that soldier would not sincerely believe that the terrorists were specifically targeting only his loved one, nor would the soldier try to avenge the death of his loved one by only seeking out those directly involved in planning the attacks.

Walzer asserts that soldiers may be attacked as a class because they are already fighters. So, then, it would be permissible to shoot the naked soldier. Individual soldiers have been made into dangerous men, and regardless of how much choice they had in that option (i.e the draft), the individual soldier has allowed himself to be made into a dangerous man.⁵² It is because of this reason that the soldier finds himself in a

⁵¹ Walzer, 144.

⁵² Walzer, 145.

state of constant danger (even when bathing!), even though the actual risks are often much reduced.

Some have argued that combatant status not only can apply to the soldiers fighting in war, but also to those people or classes of people that are influencing how the soldiers fight, such as people who manufacture equipment or munitions. This viewpoint recognizes that many, many workers must be mobilized even before soldiers can even begin to fight. Can American troops go back and forth between theaters of operations without the aircraft produced by Lockheed Martin, Boeing, or Northrop Grumman? Can American troops blend in with and weather harsh climates without specially made uniforms? Can American armed forces fire back at their opponents without first having their M-4s manufactured by various defense contractors? Can American troops subsist without having Meals Ready to Eat (MREs) at their disposal? Walzer believes that it is hard to extend combatant status beyond the class of soldiers, but recognizes the temptation to attack the enemy behind the lines, especially if one side is not winning decisively as they would expect.⁵³ Walzer believes that to attack beyond the class of soldiers, though, is to make war against the people.⁵⁴ Even if the people are involved in weapon manufacturing, they are still technically civilian, as they have not officially been sworn in as part of a fighting force, do not wear military uniforms, and probably do not openly carry arms. Walzer advocates drawing a line

⁵³ Walzer, 146.

⁵⁴ Walzer, 146.

between those who have lost their rights because of warlike activities and those who have not.

This being said, though, a somewhat pressing case may be made for giving weapons manufacturers combatant status in addition to a regular soldier. Weapons manufacturers produce what soldiers need to fight, not just what they need to live, such as food or clothing. When it is absolutely militarily necessary (and Walzer seems to lend a tone of urgency here), workers in a weapons manufacturing factory may be targeted. Walzer seems to concede that this is a last resort action, as he admits these workers are not really doing anything war-like in their actions, but as an act of extreme military necessity, they may be attacked.

One might raise this question regarding the hesitant classification of weapons manufacturers as combatants—though a factory worker producing weapons would only take on combatant status as a last resort—how come we tend to view Iraqis putting together IEDs as combatants? The answer is this: the factory worker assembling weapons is more removed from the battlefield than the Iraqi assembling an IED. A factory worker is not likely to be directly involved in the deployment of the weapon, whereas the Iraqis who make IEDs are often directly involved in the use of their weapons. So, then, it makes sense that the Iraqis that manufacture IEDs could be considered combatants, because they often participate in the use of the weapon.

Taking cues from Rousseau, Walzer believes that a collective combatant status should be maintained. Walzer believes that soldiers must be viewed as a collective class

to fulfill one of the most important tenets of Just War Theory, to keep war away from noncombatants and focused only on combatants. In sectioning off a combatant class, a defined playing field with defined teams is created. And the spectators to the events, the noncombatants, are rightfully out of the action.

Not surprisingly, especially in light of recent events in Iraq, some have objected to Walzer's view of collective combatant status. In treating soldiers collectively by assigning blanket combatant status to a soldier class, some argue that Walzer is ignoring the individual soldier's reflective nature in giving permission to the individual soldier to kill an enemy soldier simply because the enemy soldier is also of the opposing soldier class. Interestingly enough, Walzer recognizes this and concedes that soldiers do engage in moral reflection, which then sometimes leads to hesitancy to kill enemy soldiers. Even though soldiers may be collectively assigned combatant status, soldiers also encounter one another on the battlefield on an individual, sometimes personal, level. Walzer states that on an individual level, soldiers often have hesitancy in killing other soldiers, especially if the opposing soldier does not seem overtly threatening at that particular moment. Walzer took a letter written from an English soldier in World War I to his brother:

"When we were marching along a sunken road, we got the wind up once. We knew we must have passed the German outposts somewhere on our left rear. All at once, the cry rang down, 'Line the bank.' There was a tremendous scurry of fixing bayonets, tugging of breech covers, and opening pouches, but when we peeped over, behold a solitary German, haring along toward us, with his head down and his arms stretched in front of him, as if he were going to take a high dive through the earth

(which I have no doubt he would like to have done). Nobody offered to shoot him, he looked too funny..."⁵⁵

From this brief passage, the soldier-author conveys that no one wanted to shoot the opposing German soldier, even though he was obviously marked as a soldier. No one wanted to shoot the German soldier, because at that precise moment, he did not seem like an urgent military threat. There was a reluctance to kill the uniformed German soldier—the English soldiers had some sort of an innate restraint, a distaste for killing him, like Walzer's other example of the naked soldier. To further illustrate the hesitancy to kill, even between soldiers who have been directed to and have the authority to kill enemy soldiers during wartime, here is a passage from a diary of a British soldier in World War II:

"There was a wonderfully vulgar sunrise. Everything was the color of pink geraniums, and birds were singing. We felt like Noah must have when he saw his rainbow. Suddenly Viner pointed across the stretch of scrubby heath. An individual, dressed in a German uniform, was wandering like a sleepwalker across our line of fire. It was clear that for the moment he had forgotten war—as we had been doing—and was reveling in the promise of warmth and spring. 'Shall I bump him off?' asked Viner, without a note of expression in his voice. I had to decide quickly. 'No,' I replied, 'just scare him away.'"⁵⁶

The critical point in this passage is that the British soldier did not want to kill the opposing German soldier, because the German soldier had appeared to be similar to himself, enjoying the sunset. Both soldiers were engaged in "peculiarly human activity."⁵⁷ The British soldier felt a sense of being a fellow man with the German

⁵⁵ Walzer, 139.

⁵⁶ Walzer, 140-141.

⁵⁷ Walzer, 141.

soldier. Walzer points out that the British soldier assessed the German soldier to be a fellow man like himself, who was unthreatening at the very moment. The British soldier felt as though the German soldier at that specific point in time is just as valuable as himself. This reluctance to kill is also evident in soldiers in the Iraq War. John Prior, a US Army soldier, remarked that he was “pleased” that during one of his tours to Iraq, that he only lost one of his troops. He was even more pleased that only two of his soldiers actually had to shoot at Iraqi insurgents.⁵⁸

Although soldiers are often described in military doctrine as the technology of war, the fact of the matter is that a soldier will never just be an instrument of war. Soldiers, even when in an organized, uniformed fighting force, are still individuals at the basic level—individuals who wrestle with moral issues and subsequently reflect on these issues. These passages recounting soldiers’ inability to kill their enemy shows just that. Though soldiers may be considered collectively, even Walzer himself agrees that soldiers still meet on the battlefield as individuals.

While this objection to Walzer’s view that soldiers often do not and cannot remove their individual reflection and morality on the battlefield is certainly pressing, I do not believe that this weakens Walzer’s view. Walzer himself acknowledges and allows that this slide back to individual concern from a collective status is prevalent amongst soldiers in wartime, and he does not condemn it. Instead, Walzer says that a soldier *may* target an enemy soldier based on the enemy soldier’s collective combatant

⁵⁸ Packer, 331.

status, not that the soldier *must* target the enemy soldier. Walzer does not call for a punishment of the soldier that refused to fire on the enemy soldier, but rather just provides this soldier permission to target the enemy soldier. So this argument that says that Walzer's conception collective combatant status wipes out any individual reflection or decision about killing in war does not hold.

Walzer's conception of a collective combatant status is the most realistic and most practical way for soldiers to uphold the principle of discrimination. Though some have argued that assigning a collective combatant status removes individual decisions and reflection on the battlefield, as I have discussed, it is far from that. Instead, by putting combatants in one large category and then putting noncombatants in the other category, Walzer attempts to keep the violence of war targeted at only the combatant group. Though his distinction is obviously rough-grained, it gives soldiers realistic practical guidelines on targeting the enemy force. Walzer's view does not require soldiers to make complex decisions regarding the motivations or immediate threats of individual enemy soldiers before aiming their weapons at them, but nor does it condemn those soldiers who do.

McMahan's View

In opposition to Walzer's view of a collective combatant status is Jeff McMahan's view. McMahan finds that Walzer's idea of a collective combatant status is problematic. He instead believes that the rules of war, specifically the principle of discrimination, must be developed with a regard for the ways that their announcement is likely to affect

soldiers' behavior. McMahan argues that the morality in war should not be separate from morality outside of war—it should merely be an extension of it.

McMahan does not think that morality is collectivized regarding combatant status, but thinks that soldiers must act on the basis of presumptions of liability. And because the nature of warfare changes from situation to situation, battle to battle, McMahan points out that these presumptions of liability may vary from one context to another. To illustrate this idea, McMahan gives a real world example relating to the first Gulf War. In his example, McMahan states that during the Gulf War, Iraqi units composed of conscripts ought to have been treated differently than soldiers of the Iraqi Republican Guard. Walzer would claim that the conscripts did not *have* to be treated differently since they held a collective combatant status. McMahan disagrees. In his article "Killing in War: A Reply to Walzer," he writes, "No Iraqi soldier's moral status or liability was determined by his membership in the Republican Guard or being a conscript." McMahan's difference in treatment of the Iraqi conscripts is grounded in acting on the basis of what he calls reasonable presumptions. If American forces had the knowledge that specific units were conscripts, then the Iraqi conscript units should have been treated more humanely than the members of the Republican Guard. It is unclear what exactly McMahan means by treating more humanely, whether he means sparing these soldiers altogether or just using less firepower towards them. McMahan alludes to soldiers needing to use a more proportional scope when viewing these conscripts, but does not provide any specifics about what this actually means to him.

McMahan seems to concede to Walzer's view when he allows that American soldiers were "entitled to presume" that any member of the Iraqi Republican Guard during the Gulf War was "culpably defending a wrongful aggression."⁵⁹ Even if a Republican Guard soldier had been coerced to join the army by family, and even if the soldier had pledged to fire over the heads of American soldiers and would thereby pose no threat at all, American soldiers were justified in assuming this Republican Guard soldier was fair game. McMahan allows this because he realizes that the knowledge required to act in the objectively just way in this scenario is unavailable at the time of action. There is no way an American soldier could know the Iraqi soldier's intentions when they met on the battlefield, unless of course, the Iraqi soldier incredibly called a time-out and announced his intentions. This is why McMahan believes that although "...reliable information about the degree of an individual's moral responsibility is virtually never available in conditions of war," this does not mean that a combatant's liability should be collectivized in the class of combatants.⁶⁰ It means that soldiers should act on the basis of contextual presumptions of liability.

As one can imagine, Walzer questioned McMahan's conception of individual responsibility in war, claiming it was not practical in wartime. Walzer then asked what McMahan would say to American troops to explain to them that they should treat Iraqi conscript soldiers differently than Iraqi Republican Guard soldiers. McMahan says that

⁵⁹ Jeff McMahan, "Killing in War: A Reply to Walzer." *Philosophia* 34 (2006), 47.

⁶⁰ McMahan, 48.

soldiers often believe that enemies should be treated differently depending on the circumstances and illustrates this in tweaking his initial example—instead of fighting conscripts, he changes the opposing force to a squadron of child soldiers, ranging from 10 to 15 years of age. The child soldiers were not willing participants in this army, but were abducted, brutalized, and indoctrinated into the army. McMahan believes Walzer's view would give the children a collective combatant status. But as a hypothetical commander of American troops facing this squadron of child-soldiers, McMahan says he will say this to his soldiers:

"You're aware that we sometimes have to adjust the level of our firepower to take proper account of the status of our targets. If, for example, we knew that enemy forces had taken neutral civilians hostage and were using them as shield, we might have to employ lesser force than we otherwise would in order to minimize the harm we would cause to the civilians. We might, indeed, have to fine-tune our level of force in relation to the number or proportion of civilians present amongst the enemy combatants. We now confront an army of children. They're as dangerous as adults would be—indeed more so because of the drugs they've been given. But they're also victims of those who're exploiting them. They're scarcely responsible at all for what they're doing. We should do what we can to spare them. Take additional risks, if necessary, to try to drive them back without injuring them, or to incapacitate, subdue, or capture them rather than kill them."⁶¹

McMahan states he believes words such as these would receive respect from his soldiers, rather than scorn or contempt. He extends this example to addressing soldiers about treating groups of conscripts in the same matter, noting that treating the conscripts more humanely would not be absurd.

⁶¹ McMahan, 48.

What McMahan argues is essentially this—that we should not treat combatants collectively, but that soldiers should act under certain presumptions of liability as driven by the context. So, soldiers should not just be able to kill all combatants, but must view the opposing combatant's liability in the context. If soldier knows, for instance, that the opposing soldier had been conscripted against his will, then this soldier may permissibly treat the opposing soldier more humanely, or as McMahan seems to indicate, would be blameworthy if he did not treat the opposing soldier more humanely.

McMahan's view, though appealing at first glance, is idealistic. Sure, in an ideal situation, soldiers would have the time and opportunity to consider the opposing soldier's liability. While time and opportunity are certainly part of the overall context in which a soldier (or any person really) should determine what to do, fact of the matter is that often times neither time nor opportunity are substantial in battle situations. McMahan himself even recognizes this weakness of his argument when he notes that information about an enemy's moral responsibility is "virtually never available in the conditions of war."⁶²

I also think that McMahan's example of the child soldiers is a bit dramatic and may overemphasize his point. Instead of discussing treatment of conscripts, McMahan swung to the extreme and appealed to emotions by placing young, coerced, and drugged children in the role of the opposing combatant force. Of course in using this example, one would agree with the unease of killing child soldiers, even though the

⁶² McMahan, 47.

child soldiers are just as dangerous as the adults, simply because we are discussing a squadron composed solely of children. I have already discussed how the Iraqi insurgents are employing children, and the reluctance to kill these children which is embedded in soldiers' views of traditional combatant status. However, these Iraqi children are not forming battalions, or squadrons, or brigades, as they participate in a more piecemeal manner. McMahan's example of child conscripts provokes an extreme emotional reaction. Instead of seeing his point that soldiers often view and may even treat certain parts of an enemy force differently, one may instead focus on the atrocity of killing a child, regardless of any wartime circumstances surrounding it. In using the child conscript example, his point loses a little steam.

In advocating that soldiers use context-based presumptions of liability when facing a combatant force on the battlefield, McMahan places a great deal of responsibility on the individual soldier. As I will discuss in the next section a bit more in depth, it would be nice to assume and be correct that all of a nation's soldiers are of the most academic, most philosophical stock. However, this is just not the case. Many of the American troops on the front lines in Iraq are fresh out of high school—18, 19, 20 year olds who are toting guns and have left home for the first time. The United States has sent these young soldiers over to a country with a language, culture, and way of fighting that is obviously different from what they are accustomed to. The US government has required these soldiers to do extraordinary things like beating back the

insurgency and rebuilding Iraq. To require individual soldiers to determine the liability of the opposing force is a tall order.

The rules of war, particularly in classifying combatants collectively, help soldiers relieve some of the burden of moral reflection on the battlefield and to focus on fighting justly. And the burden on the battlefield, as I have discussed, is a great burden.

American and coalition soldiers are facing an enemy they often cannot even identify, and the enemy is moving stealthily throughout the people. The enemy in Iraq is fighting American soldiers much differently than the American soldiers have been trained for. American soldiers have a lot on their plates right now. Instead of asking soldiers to use reflection only in appropriate, though hardly ever occurring, circumstances—and how do you determine what an appropriate context is?—viewing combatants collectively gives the soldiers a quick reference to make the best decision in the heat of battle. Are they perfect guidelines, and do they always produce the optimal decisions in wartime? No, of course not, but the collectivist view of combatants makes a valiant effort at containing the violence to the teams on the battlefield, so that the players on each team can focus on the game.

Furthermore, as I stated earlier, I do not believe that Walzer or one holding the collectivist viewpoint would condemn an individual soldier for failing to shoot at a conscript or even a child soldier. Instead, I believe the collectivist would say that in shooting the conscript or child soldier, the shooter was justified in doing so. But if the

soldier did not choose to shoot the conscript or child soldier, the collectivist would not say the soldier was blameworthy for refraining to act.

May's View

In his article "Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants," author Larry May also argues against Walzer's view of a collective combatant status. May says there are serious problems when trying to determine the social groups of "soldiers" or "civilians," "combatants" or "noncombatants." May believes that the principle of discrimination as it stands does not offer any real guidance to soldiers because it offers "no clear guidance, morally relevant line between those who fight and those who don't,"⁶³ especially in light of events in OIF. May seems to argue for a form of McMahan's contextually-based liability regarding combatant status.

May highlights the fact that the principle of discrimination is still interpreted traditionally, though for various practical reasons already discussed it should not be. Even though in modern warfare, especially in Iraq, the line between combatants and noncombatants is extremely blurred, May agrees that the principle of discrimination is still important, for the simple fact that it makes the soldiers "stop and think" before the shoot about *who* exactly they are shooting at.⁶⁴ This, in turn, has been showed to minimize violence, which is one of the main goals of Just War Theory.

⁶³ May, 39.

⁶⁴ May, 40.

As Walzer may have drawn inspiration from Rousseau's collective conception of combatant status, it appears that May also may have drawn inspiration from a historical source—the works of Hugo Grotius in the early seventeenth century. Written on the cusp of emerging nation states, Grotius developed a brand of war theory that was focused on individual relations between soldiers. War was not to be managed by a completely separate sphere of ethics, and instead called for an extension of ethics that operated in “normal” life. In his *Laws of War and Peace*, Grotius was rightfully concerned with the discrimination between combatants and noncombatants. Grotius stated that women, children, and old men should be afforded the status of noncombatants, or innocents. He also spelled out that professions regarding religion should not be considered combatants, nor should farmers, merchants, soldiers who have surrendered, or prisoners of war. Interestingly enough, Grotius did not believe that merely being part of an army gave a soldier combatant status. Grotius called for fine-grained distinctions within the ranks of soldiers to identify combatants, and under his view, very few soldiers are combatants at all.

May accepts the torch from Grotius and calls attention to the problems of identifying combatants collectively. May rightly notes that much of the conceptual and legal basis in identifying combatants has failed to take into account insurgent fighters as we are seeing in Iraq, and he notes that such fighters are just as “morally worthy” of attack as a regular force.⁶⁵ There have been attempts, as evidenced by the

⁶⁵ May, 41.

amendments to the Geneva Conventions contained in Protocol 1, Article 44, to try to resolve this problem of assigning combatant status to guerillas and insurgents, though they have still fallen short, as I will discuss later on in this paper.

Unlike many others who view soldiers collectively, May believes that soldiers as a group are hard to define conceptually. Trying to draw a distinct line between combatants and noncombatants on the basis of such things as innocence or guilt is extremely problematic for May. May recognizes that although soldiers, like the other citizens that let their country go to war, may bear some collective guilt for their country participating in an unjust war, the individual soldier's share of the guilt is minute. Soldiers typically do what they are ordered to do—stand up and serve when called upon for their country's defense. May writes, "Lacking the requisite *mens rea*, soldiers are not personally guilty in a way that would make them liable to be attacked."⁶⁶

May notes that something like innocence and guiltiness of an individual soldier is typically judged in degrees. When moral judgments in war are made on the basis of rough grained markers such as a group or class of soldiers, May believes we must eliminate or at least diminish morally relevant differences among members of the group. For instance, not all coalition soldiers in Iraq are patrolling downtown Baghdad or fighting the insurgents hand-to-hand. Some coalition soldiers are stationed in Iraq to process personnel paperwork, some soldiers are cooks, and some soldiers ensure the accountability of equipment. Surely these soldiers are not as culpable as the ones toting

⁶⁶ May, 43.

M-4s and raiding neighborhoods searching for weapons caches. Not all soldiers are guilty to the same extent, even if the baseline of their guilt is that they are the soldiers representing an aggressing state resulting from their collective guilt in the push towards war. Likewise, May would seem to say that not all Iraqi insurgents are guilty to the same degree either.

May takes particular issue with Walzer's discussion of collective combatant status as illustrated by his famous naked soldier example. May thinks that the collective approach to determining combatant status runs into major problems when one asks the question why a particular member of the group can be killed.⁶⁷ Walzer defines the class of soldiers as being combatants because they have been made into dangerous men, and have forfeited their immunity to be protected in wartime. May reasons that if every single member of the group of soldiers is dangerous by carrying arms in a military unit, it is hard to see why a soldier cannot take himself out of the group, regaining his protection from being killed. When a soldier drops his weapon and raises his hands, May wonders, would Walzer maintain that this soldier may still be shot and killed by enemy forces?⁶⁸ So what, then, is the difference between this soldier and the naked soldier? An easy and common sense answer might be that the soldiers who drops his weapon and raises his hands is signaling surrender and that he will not continue to fight

⁶⁷ May, 44.

⁶⁸ May, 45.

as a dangerous man, whereas the soldier who has set down his weapon to take a bath may soon pick up his weapon and resume fighting.

May concedes that he, too, agrees somewhat with this analysis, but poses a good question when he asks why all soldiers should be treated the same as a class of combatants. Why can a soldier only regain protection from being killed by removing himself from the collective group of soldiers by surrendering? May turns to critiquing the collectivist view of combatant status, mainly Walzer's view. He says that even though Walzer stands by his collective view of combatant status, Walzer's example of Robert Graves' hesitancy to shoot the naked soldier makes his view "morally disturbing."⁶⁹ May advocates a more fine-grained approach to determining who or who does not have immunity from being killed in wartime. He thinks his approach will greatly limit who may be considered combatants that are liable to be attacked, thus (in theory) leading to less violence in war.⁷⁰

First and foremost, May argues, many soldiers are not immediately dangerous to other soldiers. One would be hard pressed to explain what immediate danger that cooks, personnelists, or public affairs soldiers may pose. However, if an enemy soldier points loaded weapon at you, then certainly this enemy soldier is immediately dangerous, and a principle of self defense attaches and you are permitted to kill this enemy soldier. If another soldier fighting with you is an eyewitness to this attack on

⁶⁹ May, 46.

⁷⁰ May, 46.

you, he may also shoot to kill the enemy soldier as well. This is a concept also found in law enforcement. When a law enforcement officer is faced with a deadly both to himself and his partner, he is authorized to use deadly force against the perpetrator.

May highlights the work of Grotius by saying that it is a mistake to view all enemy soldiers as forming a single group of being dangerous men.⁷¹ He reemphasizes the point that many soldiers in modern times never fire a shot or directly engage in combat, and this has become a realistic expectation of many soldiers. There is a wide spectrum of duties that members of the US military fulfill—some soldiers only inventory and organize equipment, some soldiers only provide legal aid to other troops, and some soldiers serve as photographers of soldier life, even though all soldiers are expected to take up a weapon and fight in times of emergency. May also piggybacks Grotius when he notes that often many soldiers, particularly those who were drafted into service, do not even agree with fighting the war, and have “nothing to gain” from shooting enemy soldiers.⁷² And with a war that is as hotly contested as the Iraq War, there is a good possibility that some American soldiers may not agree with fighting the war.

May notes that Grotius steers the importance of adhering to principles of war away from a legalist perspective to that of a perspective of humanity. Instead of just being concerned with who or who may not be considered combatants, soldiers should focus on humanity and displaying mercy in war, when it does not place their own lives in

⁷¹ May, 42.

⁷² May, 42.

jeopardy (though Walzer would probably argue that as a soldier in battle, their lives are always in jeopardy, and that this may be an unrealistic focus). Just War Theory has embraced humanity, from which international humanitarian law has been shaped. International humanitarian law has functioned to reduce suffering and to restrict conduct in war, and May states that “treating people humanely will mean that their merely being in some general sense dangerous is not enough justifiably to kill them.”⁷³

At the heart of May’s argument is that a collective view of combatant status should not be an absolute rule, and that soldiers should not be permitted to kill enemy soldiers just simply based on the fact that they belong to the class of enemy soldiers. May thinks that this collective view should be merely a framework in which soldiers can make decisions on if certain enemy combatants are posing a danger to them.⁷⁴

It would seem as though May was trying to throw the principle of discrimination out the window, but he insists that is not the case. Social groups, particularly the group of combatants, should not drive blanket rules of war (i.e. only attack enemy soldiers, do not attack civilians). This being said, though, May states that we cannot completely throw the categorization of the soldier class out the window, because as is the case with relations between other social groups, soldiers still need a general framework. For instance, when we are sick and seeking a doctor to cure our ailments, instead of stopping random people on the street for medical assistance, we tend to consult the

⁷³ May, 47.

⁷⁴ May, 47.

“Doctors” section of the phone book, or head to the nearest health care center.

Likewise, instead of trying to pick off random Iraqis on the streets of Baghdad, American and coalition forces should focus on identifying (if possible) insurgents.

What May does advocate is that a soldier needs to look further than the combatant category to determine if certain combatants are posing a threat to them at the particular moment. So in the case of the naked soldier, unlike Walzer who believes that Robert Graves would have been justified in killing the naked soldier, May believes Robert Graves was justified in *not* killing the enemy soldier who was bathing. Because the enemy soldier appeared to be taking a bath, and not suited up or aimed to fight, then he was not considered a threat at that moment. And if the enemy soldier was not considered to be a threat at the moment, then Robert Graves would have been justified in refraining from shooting the enemy soldier. May goes a step further than Walzer and claims that the soldier may be unjustified in picking up the rifle and shooting the naked soldier. This situation, for May, is one where the soldier had ample time to determine the immediacy of the threat was not present so therefore the soldier should not have fired upon the bathing soldier. But May does acknowledge that the naked soldier may not be as harmless as he seemed, for perhaps the naked soldier had a locked and loaded rifle on the other side of the tub. Maybe bathing was part of a ruse to lure the opposing forces in. May concedes that if this was the situation, then Robert Graves was justified in taking aim at the enemy soldier. So which is it? Is the soldier justified or unjustified in taking aim at a naked soldier? One might argue that it depends whether or not the

naked soldier can be seen as a reasonable threat at the time, reasonable being the operative word. But again, “reasonable” can be very different between individual soldiers. A soldier who has been attacked by an enemy soldier that he previously passed over in battle due to a personal choice might be more apt to anticipate a future attack and take aim at the naked soldier. Conversely, a soldier who had never raised his weapon at an enemy soldier might reserve his aim at the naked soldier for another target at another time. May wants to have his cake and eat it too, when he concedes that both options may be the answer depending on how the soldier perceived the threat.

I think May is trying to accommodate the challenges soldiers are facing in Iraq when he puts a threat-based focus on the waning principle of discrimination. He equates this tactic with how law enforcement officers are trained in use of force situations, noting that making one consider the legitimacy of the threat prior to shooting has resulted in less violence used in the law enforcement realm.

Law enforcement officers are equipped with a range of weapons to accommodate a range of threats. For low level threats, officers may use anything from martial arts or pressure point physical tactics to restraining someone in handcuffs. If the threat escalates from there, they are then permitted to move up in force and use pepper spray or a baton. If there is a serious threat to the officer or his partner’s life (or any other innocent bystanders), then the officer may use deadly force. When the officer uses deadly force to suppress a perpetrator, he or she must go before a shooting board

or court of law to explain the circumstances. To be cleared of any wrongdoing, all the officer must prove was that he or she had a reasonable belief based on the circumstances at the time that the perpetrator was going to inflict serious harm on the officer, his partner, or any other innocent people in the vicinity. No “Monday morning quarterbacking” is allowed. This is what May believes soldiers should do when approaching threats by enemy soldiers or in the case of Iraq, insurgents masquerading as civilians.

Though on the surface this may seem to be a legitimate way to view how soldiers should view the enemy in wartime, the context in which law enforcement officers and soldiers operate in is much different. Soldiers know they have a mission to attack, neutralize, or defend against a somewhat set enemy, even though the insurgency in Iraq has challenged some of these notions. Law enforcement officers operate in a realm of civilians with a few instances of random, contained, and unconnected violence that is often not targeted against the law enforcement officers. Though some may argue that the insurgency in Iraq has the feel of a law enforcement operation, the violence in OIF is more widespread, connected, and often targeted at coalition forces.

While a large portion of May’s view regarding combatant status seems compatible to McMahan’s views, May’s view also becomes somewhat compatible with Walzer’s view when he allows that in emergency situations, where there is no time for leisurely moral reflection on the issue, it is appropriate for soldiers to use the simple

rule of attacking enemy soldiers, and not attacking civilians. But when there is time to take a moment to reflect, soldiers should try to look beyond the traditional view of a collective combatant class. I believe one of the strengths of May's argument is that it allows for a flexible interpretation of Protocol 1, Article 44, when it allows possibility of secretly-armed insurgents disguised as civilians to make themselves into legitimate combatants when they unveil themselves. May's argument appeals to our basic sense of self-defense, allowing soldiers to mitigate the threats to their own lives, regardless if the individuals posing a threat to their lives are defined combatants. In citing the challenges posed by guerilla and insurgent fighters, he writes:

"if we use the traditional category of soldier, what are we to do about guerilla fighters and other irregular fighters who are just as dangerous, if not more dangerous, to soldiers of a modern army operating in a large, hostile city? And if instead we shift to the slightly more helpful category of combatants, there are many problems in discerning who is part of the necessary support of the war effort and who is not. Not only do children and other people who would normally fit in the noncombatant camp sometimes fit into the combatant camp, but so do munitions workers, for instance. Thus, if one sees a crowd of civilians, it will not be easy to pick out from the crowd those who are, and those who are not, noncombatants, as we have increasingly seen in the Middle East. Soldiers will still have to make fine-grained decisions according to the traditional view of the principle of discrimination or distinction, at least if those discrimination are to be morally justifiable ones."⁷⁵

That being said, one can probably already see the many practical flaws to May's view, though I think his heart was in the right place when approaching the issue. First of all, the "test" to determine the immediate threat under his view is extremely hard to use, as he seems to want it to turn on almost a complete set of facts. In the case of the naked soldier, May said that Robert Graves was justified in not shooting the bathing

⁷⁵ May, 51.

soldier. But as even he points out, what if the bath was merely a ruse, and the enemy soldier had a weapon nearby to snipe back at the soldiers? Looking at threats on a momentary basis in war is tough. Maybe the naked soldier is not a threat at the moment, but maybe in another hour or so, he will be leading the charge against Graves and his men. May writes, "More information is needed here as well, and the information is of the same sort—namely, whether that soldier will later play a major role in attacking the enemy state, and how likely that is."⁷⁶ Along with this, a soldier can easily reason that any enemy soldier may later play a major role in attack his force. For instance, what if the enemy's forces were decimated, and the enemy soldier in question was one of the few enemy soldiers that survived? Then obviously this enemy soldier could play an instrumental role in an attack. Couldn't all soldiers use this line of reasoning, then? This may be kind of a stretch, but could hold depending on certain details surrounding a situation.

Furthermore, in a fighting force where many American soldiers on the front lines in Iraq are 18, 19, 20 years old and away from home for the first time, the requirement of trying not only to assess the immediate facts plus assess the later threats an enemy soldier or insurgent may pose is highly impractical and very unrealistic. Though some may contend that the United States and other nations should have high standards for entrance into their armed forces, unfortunately this is not always a possibility. Since OIF, the US Army has struggled to meet recruitment quotas, which is probably due to

⁷⁶ May, 49.

the immense strain the Army has been placed under during the Iraq War. Fifteen-month deployments, often with little time in between deployment, have taken a toll on Army members and their families. Retention of troops has become a problem, and the Iraq War is requiring more and more American soldiers. Ordinarily, to become a member of the armed forces, one cannot have a felony on his or her record (with very few waivers being granted.) However, because of the strain of manpower, the US Army has relaxed its entry standards and waived in substantially more recruits with felonies on their records. The US Army has also lifted the previous requirement for troops to have graduated high school.

But above all else, many cases of small scale conflict are marked by emergency—when American soldiers are getting ambushed by pockets of insurgents, when American soldiers' vehicles are getting blown up by IEDs, when American soldiers are being approached by seemingly pregnant Iraqi women strapped with bombs at security checkpoints—these are not instances where American soldiers, regardless of education or background, have time to stop and reflect about the nature of the threat. So it would seem that more often than not in the types of situations that May is targeting in his article, soldiers are going to revert back to the delineated rule of killing soldiers, and sparing civilians. May even recognizes this weakness in his argument as he says if others isolated his threats-based approach and cut off his concession for soldiers to return to

targeting collective combatants “effective fighting in war all but impermissible by reconfiguring the principle of discrimination.”⁷⁷

May’s allowance for a soldier to resume viewing combatants collectively in emergency situations makes his view compatible with Walzer’s view, especially in light of some of the recent events in Iraq. Though ideally May would like to see soldiers assess the threats posed by enemy soldiers on an individual basis, more often than not, soldiers find themselves in these emergency situations. Again, I believe Walzer’s view best fulfills the practical requirements of the principle discrimination, as it provides permission to kill enemy soldiers, regardless of the motivations or immediately threats of the enemy soldier. Even May concedes that soldiers can and will revert to this view. And I believe May (and McMahan) would also support Walzer in not condemning the soldier refused to fire on an enemy soldier.

Instead of looking at what it means to be a noncombatant, I have tried to wade through what defines one as a combatant, because seems to be at the heart of the issue in Iraq. We seem to have little issue sectioning off those who are not permissible targets in war, but defining a combatant though, especially in looking at the Iraq War, seems to be more problematic as the combatants are often indistinguishable from the noncombatants. The various insurgent groups in Iraq are putting the traditional

⁷⁷ May, 50.

conception of combatant status to the test, and we must resolve these problems. Just War Theory and international humanitarian law attempted to do so following World War II and then Vietnam, and the time has come again with OIF.

This being said, what should be done, and can anything even be done? Altering Just War Theory and international humanitarian law is a tall order, and not one that should be taken lightly. Though Just War Theory and international humanitarian law are certainly not perfect, they have restrained war and prevented the world from an all-out massacre. I have examined combatant status both collectively and from a more individual level, and have learned that there are many benefits and many unfortunate consequences of both views.

However, I maintain that for practical reasons above all else, we must maintain the collective view of combatant status for soldiers. I admit that May's argument for a law enforcement model of responding to direct threats was initially tempting. I believe May had his heart in the right place with his argument as he was trying to tackle the fresh problems we are seeing in Iraq regarding discriminating between combatants and noncombatants. He tried to put himself on the front lines in giving the soldiers the authority to target and defend based on immediate threats. However, much like McMahan, he put himself on the front lines as an academic, one who has the time and the motivation to consider many possibilities before firing his weapon at a threat. In reality, though, the 18, 19, 20-year-old soldiers do not have this luxury of time and complete information when fighting the insurgents in Iraq. Soldiers need a quicker

frame of reference, like collective combatant status, though in Iraq, as we have seen, this still may not be helpful. That aside for now, limiting warfare is one of the greatest achievements of international law. Standards for wartime have been tag teamed by Just War Theory and international humanitarian law. To assign standards to wartime conduct must also mean that there needs to be a group to which these standards are assigned—the soldier class.

Though there are warts to the collective view of combatant status, namely, that soldiers still tend at times to relate as individuals and not as instruments of the state, the practical importance of maintaining this view trumps everything else. In the heat of battle, soldiers need to have quick reference points for determining who is a legitimate target of violence. Hence the pocket card during the Gulf War—though it seems silly outside the strain of combat to squish a robust war philosophy into a few lines, soldiers need to have a few clear-cut guidelines on who is fair game when things get rough. When American soldiers are being ambushed by small pockets of insurgents, they need to have these basic, quick rules to fall back on. They do not have time to lay down their weapons, pull out a collection of the works of Grotius, take a few notes, engage in discussion with their fellow enemy soldier, and then decide to shoot or not. Soldiers need to act now! But I have recognized that the insurgents in Iraq fall outside an easily discernible combatant status. So now what?

A Solution?

With a push to view combatants collectively, I want to now apply this to the insurgent groups US and coalition forces are fighting in Iraq. If we attempt to view the insurgents in a collective manner, will the insurgents even qualify as combatants? Combatant status not only provides combatants with certain rights on the battlefield, like POW rights, but it also makes them legitimate targets. It would also give them blanket status to target the opposing force. And if the insurgents do not collectively qualify as combatants, what does this mean to American and coalition forces?

International humanitarian law has defined combatant status through various Geneva Conventions and amendments to the conventions. The Geneva Conventions were the legal product of the Just War Theory tradition, along with real world issues that nations and armies were faced with in wartime. If you recall, the Geneva Conventions of 1949 which provided guidance on noncombatant status, also defined combatants using four conditions. A person was considered a combatant if:

1. He is commanded by a persona responsible for his subordinates
2. He has a fixed distinctive sign recognizable at a distance
3. He carries arms openly
4. He conducts his operations in accordance with the laws and customs of war.

Criteria to aid this process were given and were again ratified by many countries in 1977, and we have particularly focused on Protocol 1, Article 44 which further discusses combatant status. Important aspects of the protocol have been highlighted below:

“3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. **Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:**

(a) During each military engagement, and

(b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.”

It is easy to already recognize that fitting Iraqi insurgent groups into these updated guidelines is extremely problematic.

Under the guidelines of the 1949 Geneva Conventions, it is perhaps more obvious how insurgents fail to meet the traditional standards for combatant status. The first requirement for a soldier to be granted combatant status is that the soldier be under the command of another person or soldier who is responsible for his respective subordinates. However, many insurgent groups in Iraq are characterized by a leadership

vacuum. For instance, the Sunni insurgency has been notorious for a lack of leadership. Al Qaeda and other terrorist groups operate in a cell structure, which makes identifying and effectively targeting leadership extremely difficult.

The next requirement as laid out by the 1949 Geneva Conventions to grant soldiers combatant status is that the soldier must display a fixed distinctive sign recognizable at a distance. The Iraqi insurgent groups have shirked this requirement as they do not wear uniforms or even attempt to distinguish themselves from the civilian population, as the tactics for an effective insurgency require the insurgents to blend into the civilian population. The insurgents in Iraq have taken to passing themselves off as civilians, and sometimes even in the most despicable way, donning police and military uniforms, two symbols associated with protection of the people. To further thwart the traditional conception of combatants, the Iraqi insurgents have turned to recruiting women and children to participate in attacks on the Iraqi civilian population and US soldiers. Women and children have increasingly become more involved with attacks in Iraq. It is often unclear at the time of the attack which group is even conducting the attack, or even if it is an insurgent group at all, as many attacks may be attributed to general criminal violence on an individual level. US and coalition intelligence spends a great deal of effort determining which insurgent groups are responsible for attacks, unless members of the various insurgent groups come forward and claim responsibility for them.

The third requirement under the 1949 Geneva Conventions for the assignment of combatant status is that the soldier must carry arms openly. This means that a combatant must carry his weapons or weapons in plain view, especially right before an attack on enemy soldiers. This requirement seems to be the most crucial quality of a combatant, as even the 1977 amendment to the Geneva Conventions still retained it when it extended combatant status to non-informed irregular fighters. After looking a few examples of how insurgents are waging war in Iraq in this paper combined with common knowledge of events in Iraq per the media, we can see that many insurgents in Iraq are not taking heed to this requirement. Suicide bombers often disguise themselves and their explosives to infiltrate security and pull off their deadly attacks. Women are even strapping bombs to their midsections, creating the ruse of a pregnant woman to carry out attacks on security checkpoints. Insurgents have strapped bombs under the chairs of handicapped people. Insurgents use remote detonation devices to set off roadside bombs and IEDs that take out truckloads of our troops. Many insurgents are defying the requirement to carry arms openly.

And last, but not least, the last requirement for combatant status per the 1949 Geneva Conventions is that soldiers conduct themselves according to the laws and customs of war, as laid out by Just War Theory and international humanitarian law. From what I have discussed just in this paper, we can see that many insurgents in Iraq are defying war convention standards. They are indiscriminately conducting attacks not only on coalition personnel, but on innocent Iraqi civilians all over the country. The

insurgents have shown little care for treating captured coalition soldiers, coalition civilians, Iraqi civilians, or Iraqi political targets humanely, as we have seen and heard tales of assassinations, kidnappings, and beheadings. The insurgents are not following the rules of war. However, recall that another principle of *jus in bello* requires that those adhering to the war convention principles must not strike back at their enemies for not doing so. So despite the lack of interest in *jus in bello* principles by the insurgents, as a nation who is a signatory to the Geneva Conventions, and also a nation that is concerned with being an example of morality, the United States will not (or should not at least) start fighting the insurgents dirty just because they are fighting dirty.

In 1977 the Geneva Conventions were amended in light of the challenges experienced in Vietnam, and Protocol 1, Amendment 44 was added. The amendment extended combatant status to some insurgents, and was primarily focused on the non-uniformed nature of the insurgent or guerilla fighter. It recognized that there were certain situations in combat where the fighter could not distinguish himself from the civilian population, but that the insurgent fighter could retain combatant status as long as he carried his weapon openly during military engagements and while he is visible to his enemy soldiers preceding an attack.

This language, as is much of the language found in legal statutes, is somewhat ambiguous and leaves a lot of room for interpretation. For instance, the recognition that there are some instances where the insurgent fighter cannot distinguish himself from the civilian population is confusing. What does “cannot distinguish himself”

mean? Does it mean the insurgent was unable to distinguish himself, perhaps for financial reasons? Or does it mean that the insurgent's intended operations will not be successful unless they conducted the operations without uniforms? Or does it mean that the insurgent physically did not have access to a uniform? Or does it let the insurgent shirk the uniform because the insurgent does not feel like wearing a uniform?

Although there could be many other questions along this vein, I highly doubt the intent of this amendment to the Geneva Conventions was intended to green light insurgent tactics such as suicide bombing, using such treacherous disguises as policemen, army members, pregnant women, or even children to accomplish attacks not only on enemy forces but their civilian population as well. If the Geneva Conventions allowed such tactics in under the protocols, then the international community could be justifying such maneuvers as we have seen in Iraq. Not only would it permit coalition soldiers to target this unconventional enemy, but it would also permit this irregular force to legitimately target the coalition forces as well. Just War Theory and international humanitarian law strive to limit warfare, but as seen by the 1977 amendment to the Geneva Conventions also strives to allow for legitimate insurgent resistance to an occupying force. If the efforts of insurgents were limited though, then one might think that the occupying forces could get away with more. However, I highly doubt that suicide bombing and employing devious ruses would qualify as a legitimate effort by insurgents.

Although the requirement for a combatant to display a fixed symbol recognizable at a distance was lifted to accommodate insurgent fighters, the second important part of the 1977 amendment to the Geneva Conventions still maintains that the insurgent fighters carry arms openly to gain combatant status. They must carry arms openly during an attack, and preceding an attack as they come into view of their enemy soldiers. It appears that many insurgents in Iraq, for many possible reasons, are ignoring this stipulation. Are they ignoring this stipulation simply for survival? Could the insurgency fail to succeed if it did not resort to masking the carrying of weapons? Could the insurgents fail to defeat coalition soldiers by not displaying their weapons openly? Or is the insurgency ignoring the stipulation to carry arms openly out of sheer laziness? Maybe the insurgents don't want to put the time and effort into figuring out how to legitimately and effectively resist coalition forces. Insurgents have already been afforded protections within the Geneva Conventions to forgo a uniform so is it too much to ask to display their weapons?

Suicide bombers, disguised insurgents, the quick hit-and-run attacks on coalition forces and Iraqi civilians show how Iraqi insurgents have shirked the requirement of carrying arms openly. However, this may again be subject to interpretation. At what point does an insurgent need to carry arms openly? The Geneva Conventions state the insurgent must openly display arms preceding an attack or military operation, but what exactly this means is unclear. What moment qualifies as preceding an attack? Is a suicide bomber making a movement to trigger the bomb enough of a visible signal to

enemy forces that an attack is going to occur? Could that be considered bearing arms openly? For a requirement that seems technical in nature regarding displaying a weapon, there is relatively little technical guidance accompanying it. One can easily see how an insurgent wielding a suicide bomb or remotely detonating a device may be able to articulate his way into meeting the requirement of displaying arms openly.

If the Iraqi insurgents who are employing devious tactics such as suicide bombings *are* collectively considered combatants under a very flexible interpretation of Protocol 1, Amendment 44, this still has an immense affect on how our armed forces conduct battle in Iraq. I have discussed not only the treacherous means the insurgents are employing to fight our coalition forces, but I have also discussed the difficulties our troops have distinguishing the insurgents from the Iraqi civilian population. If under the Geneva Conventions these insurgents *are* given combatant status, then our armed forces need to amp up efforts to find *some way* to make a distinction and actually identify these combatants. One might ask why it matters if the insurgents need to be granted combatant status, because they are killing coalition soldiers anyways.

It matters a great deal to the soldiers because soldiers are trained and then indoctrinated to a moral code that goes beyond the basic notion of self-defense and calls for bravery and selflessness in battle. Soldiers take an oath upon enlistment into a nation's military, and the oath typically calls for allegiance to one's country and bravery and integrity in battle. Soldiers raise their right hands to take this oath, commit themselves to an often uncomfortable life, and put themselves into battle situations

where they know they may not come out alive. Soldiers are also bombarded with examples of other soldiers laying down their lives for the cause in the heat of battle, both in training and in wartime. Sometimes the oaths, the codes of conduct, and these examples of battlefield heroes are all the soldiers have in the fog of war. Soldiers want to obey the rules of war, they want to believe they are fighting justly and winning a war in the right way. All soldiers of nation states are schooled in the principle of discrimination, and that war is only directed at other combatants and not civilians is heavily reinforced. Soldiers expect to go to war, much like a sports team, and play the opposing team—and not play against the fans watching in the arena.

If we cannot provide a collective combatant status to Iraqi insurgents, we are requiring soldiers to go into the streets of Baghdad and take on anyone that comes their way. Going back to the sports analogy, we are placing a team into an arena and requiring the team to take on everyone else in the arena as a possible opposing player, totally disregarding the rules which our team has been taught about the game.

So if Iraqi insurgents are to qualify as a combatant force, then certain things must be done to help distinguish this combatant force from the noncombatant force. The Iraqi insurgents need to be picked out from the crowd and made into the opposing team. The American military and government must continue to realize that operations countering an insurgency should be driven by acquiring information. Important aspects of a counterinsurgency are intelligence and information operations. Information and intelligence may also help resolve the problems soldiers have distinguishing the

insurgents from the civilian population. Though McMahan and May both would agree that additional information prior to engaging in battle is optimal and is a staple of their views, the approach I am suggesting is more long term. It is true that in the heat of battle, a soldier will not have the time or opportunity to grill the enemy soldier about his motivations and determine if the soldier is a willing and immediately dangerous player, but establishing long term intelligence that continues to help create a better picture of this irregular enemy would be useful. Granted, this is a difficult task, but with strengthened intelligence, maybe American forces will be able to zoom in on fine-grained details that distinguish legitimately pregnant women from a female suicide bomber hiding a bomb on her abdomen under traditional Muslim garb. Maybe intelligence can help us pick out seemingly mundane characteristics that differentiate the gait between a child playing in the streets of Baghdad from the child who is discreetly carrying a device to remotely blow up a roadside bomb. The US government and military have already recognized the importance of good intelligence in Iraq, and have devoted more resources towards it, as seen by such examples as the increased use of with the unmanned aerial vehicles (UAVs) and the deployment of federal law enforcement agencies to assist in information operations. But further efforts could and should be made.

On the flip side of this, let me then consider that the liberal interpretation of Protocol 1, Amendment 44 is rejected, and that subsequently many of the Iraqi insurgents fail to achieve combatant status as laid out by Just War Theory and

international humanitarian law. What does that mean for coalition forces in Iraq? So if coalition forces actually *do* have the problem of fighting an unidentifiable, non-collective opposing force in Iraq, we might reconsider adopting May's argument for putting the collective combatant class on ice and focus more on a threats-based analysis of the enemy. American and coalition soldiers would instead be responding to threats to their lives from individuals operating outside of a collective combatant class. We would basically then be sitting back and throwing American soldiers into the streets of Baghdad and telling them to fend for themselves, which is an appalling thought.

By not identifying Iraqi insurgents or defining a collective combatant class and essentially throwing American and coalition soldiers into the streets of Baghdad to face piecemeal threats to their lives, we are also faced with this issue: If it doesn't matter who soldiers fight in terms of a defined combatant class, and that soldiers should simply react out of self-defense, then why should soldiers subscribe to any rules of war? If a soldier is simply trying to preserve his own life from pot-shot insurgent attacks, then why should the soldier have to follow restrictions regarding his general tactics, weaponry, or his benevolent treatment of the insurgent following the attack? Why have any rules of the game at all if the other team hasn't shown up? It matters because even though the insurgents do not seem to want to play by the rules, the United States and its allies do. And their commitment to Just War Theory *jus in bello* principles, specifically the principle of no reprisals, ensures that just because the opposing force does not

follow the rules of war, does not mean the United States can stoop to their level and forget the rules as well.

At both the national and personal level nations and soldiers strive to fight a war justly and there is potentially strong impact of fighting an opposing force that does not obtain a collective combatant status. We recognize the distaste some soldiers have for fighting a legitimate combatant, and one can only imagine the moral confusion a soldier would have after firing on a pregnant woman or child, even though the pregnant woman or child might have been wielding a suicide bomb. Whereas most civilians would have little trouble imagining firing back on anyone threatening their lives in self-defense, for the soldier who has sworn to die for their country and their country's cause, it is not a simple decision. Soldiers sign on the dotted line to meet their end if need be, and hold men and women who give their lives in time of war as the ultimate examples of bravery. A soldier's response to a threat on his or her life might not be an automatic reversion to self-defense.

Another potential impact of fighting a force that does not hold collective combatant status may be reflected in the psyche of returning soldiers in Iraq. The US Army, the branch of the armed forces that has perhaps seen the most front lines combat in OIF, has seen a dramatic rise in PTSD cases and suicides since the onset of OIF. At the time of publication of this paper, five soldiers from Ft. Carson, fresh off of deployment to Iraq, are currently the suspects in alleged homicide investigations. Although officials are hesitant to attribute these alleged crimes to the soldiers' mental

health issues stemming from combat, an evaluation is underway. PTSD along with tragic incidents such as this cannot be overlooked as a possible effect of some of these pressing issues of fighting an irregular enemy. If soldiers do not believe they are fighting a legitimate combatant, it may have serious consequences, though some of this is still speculation on my part due to the fact that hard figures on mentality of soldiers returning from Iraq are still out. However, I do not think it is outlandish to assume that soldiers that have been faced with being attacked by and responding to an irregular combatant, such as a woman or children, may be haunted by the encounter. Instead of soldiers thinking that they did something they were supposed to do and were trained for in battle (i.e. "kill my enemy") the soldier may be left with a sense of confusion about killing someone who was threatening their lives (i.e. "Was the person I just knowingly killed an insurgent? How did I know it was an insurgent? Were they really threatening me to the degree I thought?"). Killing a defined combatant may be more comfortable for soldiers than just killing a person out of self-defense, because the latter may be accompanied by a greater degree of self-doubt. If soldiers think that they were not fighting justly because they were fighting against an undefined combatant, this could potentially cause some psychological problems down the line. It would be interesting to see a study done on mental well being of soldiers who believed they were fighting a legitimate combatant force versus soldiers who did not believe they were fighting a legitimate combatant force.

With both of these interpretations of combatant status regarding Iraqi insurgents in mind, I think we should attempt include the Iraqi insurgents as combatants by clarifying international humanitarian law. International humanitarian law was amended both after World War II and as the Vietnam War was winding down, and with the ethical controversies surrounding OIF, it would only seem natural that international law would want to examine and potentially issue further guidance in regards to how soldiers should behave in wars such as Iraq. I have discussed the importance of retaining a collective combatant class in regards to practical reasons, such as aiding soldiers to avoid killing civilians and noncombatants in the heat of battle. Now may be the time to add clarification to international law, not only to ensure the soldiers are fighting justly, but to also give the soldiers the assurance that they are fighting justly. I earlier mentioned that the 1977 Amendment to the Geneva Conventions took a technical notion of weapon deployment and offered little technical guidance about what this actually meant. I think that this is a major issue to be reexamined in international law, and would hopefully provide clarification regarding insurgent warfare per OIF.

However, if increased intelligence efforts to try to fit Iraqi insurgents into a collective combatant status fail, then what? We are back at square one it seems. Walzer says this:

“But what if the guerillas [or insurgents] cannot be isolated from the people?...Characteristically, the military handbooks neither pose nor answer such questions. There is, however, a moral argument to be made if this point is reached: the

anti-guerilla war then can no longer be fought—and not just because, from a strategic standpoint, it can no longer be won. It cannot be fought because it is no longer an anti-guerilla war but an anti-social war, a war against an entire people, in which no distinctions would be possible in the actual fighting.”⁷⁸

If coalition forces cannot determine who the enemy is in Iraq, then coalition forces must not fight in Iraq. If after much effort soldiers and commanders still cannot distinguish between insurgents and civilians, then coalition must cease fighting the insurgents because the important moral principle of discrimination, which is at the heart of Just War Theory, cannot be upheld. Back to the sports analogy again, one team cannot play if the other team does not show up, nor can the team just play against all the fans in the arena.

However, abandoning a war if an army cannot determine who the enemy is amongst the people is not as simple as it may appear. Many questions then arise. For instance, at what point does a government or army call the game? Do governments or armies halt military activity at time t ? Or do governments not even let their conventionally structured forces even attempt to fight a potential insurgency? In Iraq, especially in the initial stages of our invasion, things were relatively controlled and safe for coalition troops—it wasn’t until months later that the insurgency kicked off, an insurgency that coalition forces had not seriously planned for.

Along with this, at what point do efforts in identifying a combatant class of insurgents cease? If after two...three...four...five months an army cannot determine a

⁷⁸ Walzer, 187.

combatant class, then do they halt their efforts? Or is it a matter of years? And to add to the difficulty in measurable standards is this—at what point can an army say that they have identified a combatant class? Is it when they can safely say that they have identified the look, the ways, and the weaponry of 75 percent of the insurgents? 50 percent? It is hard to create empirical standards to measure how a government or army has identified a combatant class of insurgents.

Unfortunately, there is no clear solution to the matter at hand of restricting wartime efforts to a sphere where an army can still fight justly by holding up the principle of discrimination. Until someone has come up with a solution to this difficult problem, I maintain that if a force cannot roughly separate a class of insurgents from the innocent people around them, then that the force should not fight. We should take care to keep the principle of discrimination as it is a staple of Just War Theory. We should avoid interventions or conflicts where we endanger not only our own force but more importantly the civilian population if we adhere to the principle of discrimination.

CONCLUSION

In this paper I presented the principle of discrimination and its role in Just War Theory. I also presented a grim picture of problems coalition soldiers are facing in Iraq regarding discriminating between combatants and noncombatants. I discussed the importance of viewing combatants collectively, but also recognized the contributions of other theories that have been posed to accommodate the insurgency we are facing in Iraq. I discussed

that coalition forces need to identify a combatant class of insurgents, and to do so, then a continued focus on information and intelligence operations needs to be maintained. A change in how we traditionally view combatants also must be changed, at the governmental level, and at the level of the individual soldier. I also discussed that if Iraqi insurgents could not be part of a somewhat identifiable class of combatants then confusion amongst American soldiers would ensue. *Jus in bello* principles are *for* the soldiers, and strive to instruct soldiers on the conceptual level how to fight justly. Soldiers need to know who they are fighting in order to know who they should not fight. If soldiers are not provided with a collective definition of who the enemy is, who to target, then why should the soldiers even bother to uphold the other *jus in bello* principles? If it doesn't matter who soldiers fight, then why should it matter how they fight their attackers? Somehow, a line must be drawn between the Iraqi insurgents and the innocent Iraqi civilians, and this can only be accomplished through intense intelligence efforts. The discovered subtleties between the insurgents and innocent civilians must then find their way back to the soldiers on the front line. And finally, I closed with another suggestion—that international law, at some point in the near future, needs to acknowledge some of the moral intricacies posed by the issues regarding discrimination between combatants and noncombatants, specifically a more adequate explanation of what weapons deployment preceding an attack means. International law needs to provide some framework for how to view how the Iraqi insurgents are fighting coalition forces, not just to influence the United States' moral standing but also to provide assurance for troops that they are fighting justly. American

soldiers take an oath swearing allegiance to the United States and to acting with integrity in all situations. American soldiers swear to support and defend the Constitution of the United States against all of the United States' enemies, foreign and domestic, and American soldiers swear to bear true faith and allegiance to the same. American soldiers take this obligation freely, without any of mental reservation or purpose of evasion. American soldiers swear to well and faithfully discharge the duties of the office of which they enter. American soldiers affirm or swear these things before God. American soldiers are governed by a Code of Conduct which explicitly states in its closing article, "I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in God and the United States of America." American soldiers, from the very first day of service, swear to this oath and a moral code. One can see why then American soldiers want to make sure that they are fighting justly. And after much effort, if the American soldiers cannot fight justly by not being able to distinguish between combatants and noncombatants, then they should not have to fight in Iraq.

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